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UNITED STATES DISTRICT COURT.

DISTRICT OF MASSACHUSETTS.

CASE NO. 53-79-M.

ANTHONY PINO, *Petitioner,*

v.

HENRY NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, *Respondent.*

Portions of Docket Entries.

Dec. 18, 1953—Petition for writ of habeas corpus filed.

Dec. 22, 1953—Respondent's return filed.

Dec. 22, 1953—McCarthy, J. Ordered matter set for hearing on merits on Monday, January 4, 1954, at 10:00 a.m., respondent to produce body of petitioner at hearing on January 4, 1954 at 10:00 a.m.

Dec. 22, 1953—McCarthy, J. Ordered that writ of habeas corpus issue, returnable December 23, 1953 at 11:00 a.m.

Dec. 23, 1953—McCarthy, J. Hearing on return of writ of habeas corpus. Motion for bail denied, request for ruling of law denied. Hearing continued to January 4, 1954.

Dec. 28, 1953—Marshall's return on writ of habeas corpus, with service on Dec. 23, 1953, filed.

Dec. 28, 1953—Traverse filed by petitioner.

Jan. 4, 1954—McCarthy, J. Hearing on writ of habeas corpus continues. Evidence. Petitioner's motion to

produce allowed by agreement. Motion to amend respondent's return filed and allowed after hearing.

Jan. 5, 1954—McCarthy, J. Hearing on writ of habeas corpus continues. Arguments.

Feb. 1, 1954—McCarthy, J. Order discharging writ and dismissing petition entered.

Feb. 1, 1954—Notice of appeal to the Court of Appeals under Rule 73(b), discharging writ February 1, 1954.

Feb. 1, 1954—Motion for bail pending appeal.

Feb. 2, 1954—McCarthy, J. Hearing on motion for bail pending appeal. Denied.

Feb. 2, 1954—Hearing on request for rulings of law. Denied.

Feb. 2, 1954—Notice of appeal from order denying petitioner's motion for bail pending appeal, filed.

Petition for Writ of Habeas Corpus.

To the Honorable the Judges of the District Court for the District of Massachusetts.

Respectfully represents your petitioner, Anthony Pino, and says:

I

The petitioner, Anthony Pino, is a legal resident of the United States whose home is at 633 Morrissey Boulevard, Wollaston, Massachusetts. He has resided in the United States at least since May of 1908 and is married to an American citizen whom he supports.

II

The respondent, Henry Nicolls, is District Director of Immigration and Naturalization for the Second District of the Immigration and Naturalization Service of the Department of Justice. The Second District includes Massachusetts where the petitioner lives and is now confined. The respondent has charge, direction and control of all matters relating to the arrest and deportation of aliens in this District and has custody and supervision of all arrested aliens. He is the highest official in charge of said Service in this District and is duly authorized to effectuate and execute orders and warrants of deportation.

III

On Dec 18 1953 the petitioner was arrested pursuant to an order for deportation made by a Special Inquiry Officer on March 23, 1953, and affirmed on appeal by the Board of Immigration Appeals, United States Department of Justice on August 11, 1953. The Petitioner is presently confined by the respondent within the jurisdiction of this Court and, upon information and belief, is in immediate danger of deportation.

IV

The petitioner had been at liberty under bail from January 10, 1953 until his arrest on Dec 18, 1953 pursuant to the aforesaid order of deportation.

V

The aforesaid order of deportation is based on Section 241(a)(4) of the Immigration and Nationality Act (8 U.S.C.A. Section 1251 (a)(4)) which provides for the deportation of an alien:

> "who at any time after entry is convicted of two crimes involving moral turpitude. . . . regardless of whether confined therefor. . . . . ."

The charges on which the order is based are that in 1928 the petitioner had been convicted of abuse of a female child under Massachusetts General Laws Chapter 265, Section 23 and that in 1949 the petitioner had been convicted of the larceny of a dozen golf balls.

VI

The petitioner has not been convicted of the larceny of twelve golf balls since that case is presently pending in the Third District Court of Eastern Middlesex, Cambridge, Massachusetts, the case having been placed on file. If and when the petitioner is sentenced he will have a right of appeal to the Superior Court and to a trial de novo. Furthermore, there is presently pending in said Cambridge District Court a motion for a new trial in that case filed on February 4, 1953, on which motion the decision was reserved on February 15, 1953.

VII

The deportation order is further invalid because:

A. The order is based on events and proceedings which occurred prior to the effective date of the Immigration and Nationality Act and are therefore not grounds for deportation provided under said Act; nor is said order of deportation valid under any other statute relating to deportation.

B. The crime of abuse of a female child, Massachusetts General Laws Chapter 265, Section 23, does not necessarily involve moral turpitude.

C. Previous deportation proceedings have adjudged the petitioner a non-deportable alien and that status is continued by Section 405(a) of the Immigration and Nationality Act.

D. The retrospective application of the Immigration and Nationality Act threatens the petitioner's deportation on account of events and proceedings which occurred in the past as to the effect of which the petitioner was not forewarned. The petitioner who has been a resident of the United States for all of his adult life and most of his childhood and is married to an American citizen is, by such retrospective application, being deprived without forewarning of his status as a non-deportable alien previously adjudicated in deportation proceedings substantially because of the alleged theft of a dozen golf balls with reference to which no sentence was imposed. Such application of the Immigration and Nationality Act is so harsh and unjust as to deprive the petitioner of due process of law under the Fifth Amendment to the United States Constitution.

E. The proceedings on which the deportation order was based were illegal and invalid as set out in the following paragraphs VIII to XIII inclusive.

VIII

The proceedings culminating in the aforesaid order of deportation began prior to January 5, 1953, on which date an Acting Director of the Immigration and Naturalization Service issued a warrant for the arrest of the petitioner charging that he was subject to deportation for the reasons, as set out in the warrant, that he had been convicted of two crimes involving moral turpitude, to wit: assault with intent to rape and rape; and larceny.

IX

On information and belief the warrant of arrest of January 5, 1953 was issued without a proper determination either by the applicant for that warrant or by the Acting Director who issued that warrant that a prima facie case for deportation existed; nor, on information and belief, was the Acting Director authorized to issue that warrant.

X

Thereafter, a Special Inquiry Officer conducted proceedings in this matter, presenting the case of the Immigration Service as prosecuting attorney and simultaneously hearing that case as judge. At the commencement of the proceedings the Special Inquiry Officer, without giving the petitioner adequate time to prepare his case, embarked on an investigation to determine not only whether the petitioner was deportable as charged, but (as the said Special Inquiry Officer stated) whether the petitioner was deportable "under any charge contained within the provisions of the Immigration and Nationality Act." In accordance with this stated purpose the Special Inquiry Officer introduced and admitted evidence far beyond the scope of the warrant including unverified reports of the Federal Bureau of Investigation containing miscellaneous investigative leads, as well as the petitioner's criminal record. Throughout the proceedings the Special Inquiry Officer had in his possession and referred to a file which, on information and belief, referred to the petitioner, the contents of which the Special Inquiry Officer refused to disclose to the petitioner and his attorney, and which, on information and belief, he had studied prior to and during the proceedings.

XI

During the course of the proceedings it appeared that the charge in the warrant that the petitioner had been convicted of intent to rape and rape was without foundation. The Special Inquiry Officer thereupon lodged a new charge, namely, that in 1928 the petitioner had been convicted of abuse of a female child under Massachusetts General Laws Chapter 265, Section 23.

XII

At the close of the proceedings, despite a motion raising these and other matters, the Special Inquiry Officer refused to hear any argument and adjourned the proceedings.

XIII

The conduct of these proceedings violated the Immigration and Nationality Act and the Rules and Regulations issued thereunder by the Attorney General (17 F.R. 11469, December 18, 1952; Immigration and Nationality Regulations 8 C.F.R.) and deprived the petitioner of due process of law under the Fifth Amendment to the United States Constitution in the following respects:

A. The proceedings were based on a warrant issued in violation of Section 242.1, 242.12 and 242.13 of the Immigration and Nationality Regulations as set out in paragraph IX.

B. The admission of irrelevant and hearsay evidence, the refusal to give the petitioner time to prepare his case before the Special Inquiry Officer introduced evidence, the consideration by the Special Inquiry Officer of a secret file unavailable to the petitioner, and the denial to the petitioner of subpoenas and his right to argue denied the petitioner a fair and impartial hearing as required by Section 242.53(b) of the Immigration and Nationality Regulations and by the Fifth Amendment to the United States Constitution.

C. The lodging of a new charge by the Special Inquiry Officer hearing these proceedings violated Section 242(b) of the Immigration and Nationality Act, 8 U.S.C.A. Section 1252(b), which (with exceptions not here material) prohibits the Special Inquiry Officer from participating in prosecuting functions.

D. The conduct of the proceedings by the Special Inquiry Officer assigned to hear this case as an investigation into the deportability of the petitioner apart from specific charges, and, on information and belief, the Special Inquiry Officer's investigation of this and other cases prior to these proceedings violated Section 242(b) of the Immigration and Nationality Act, 8 U.S.C.A. Section 1252(b).

E. The conduct by the same Special Inquiry Officer of the investigation, prosecution and adjudication of this case either apart from or together with the conduct specified in sub-paragraph D of this paragraph XIII deprived the petitioner of due process of law as required by the Fifth Amendment to the United States Constitution.

XIV

The petitioner has exhausted all his administrative remedies, having appealed the aforesaid deportation order to the Board of Immigration Appeals, United States Department of Justice, which appeal was denied.

XV

The petitioner's present confinement and detention by the respondent pursuant to the aforesaid deportation order are therefore illegal and unless this Honorable Court intervenes the petitioner will be illegally deported from the United States.

Wherefore, the petitioner prays:

1. That a writ of habeas corpus be issued herein directing the respondent to produce before this Honorable Court the body of the petitioner together with the cause of his detention (including the complete record of the proceedings in this matter which record the petitioner cannot make available to the Court);
2. That the petitioner be discharged from custody;
3. For such other orders, including (but not limited to) orders regarding the petitioner's release on bail, as may be appropriate.

ANTHONY PINO

United States of America
Commonwealth of Massachusetts
County of Suffolk; ss

Anthony Pino being duly sworn on his oath deposes and says that he has read and is familiar with the foregoing petition and that he knows the contents thereof and believes the same to be true.

ANTHONY PINO

Subscribed and sworn to before me, this 18th day of Dec, 1953.

MANUEL KATZ
Notary Public

Respondent's Return.

Now comes Henry Nicolls, District Director of the Immigration and Naturalization Service, Boston, Massachusetts, and makes the following return to the order to show cause:

I

Respondent admits the allegations of paragraph I of the Petition but as to the allegation that the Petitioner supports his wife the Respondent has no information sufficient to form an opinion as to same.

II

Respondent admits the allegations contained in paragraph II of the Petition.

III

Respondent admits the allegations contained in paragraph III of the Petition.

IV

Respondent admits the allegations contained in paragraph IV of the Petition.

V

Respondent admits the allegations contained in paragraph V of the Petition.

VI

Respondent denies the allegations of the first two sentences of paragraph VI of the Petition, and says that the record shows that the Petitioner has been convicted of the crime of larceny, as alleged in the warrant of deportation. With respect to the allegations contained in the third sentence of said paragraph, the respondent, upon information and belief, believes that a motion for a new trial has been filed, but has no information as to whether same is still "pending"; and, further, the Respondent says that even if these allegations are true, they have no legal effect upon the propriety or the validity of the deportation proceedings in this case.

VII

Respondent denies all the allegations of paragraph VII of the Petition, including the allegations of all subdivisions thereof, except the allegation that the Petitioner "has been a resident of the United States for all of his adult life and most of his childhood and is married to an American citizen", which is admitted.

VIII

Respondent admits the allegations of paragraph VIII of the Petition.

IX

Respondent denies the allegations contained in paragraph IX of the Petition.

X

Respondent denies the allegations of paragraph X of the Petition, except the allegation that "Throughout the proceedings the Special Inquiry Officer had in his possession and referred to a file which, on information and belief, referred to the Petitioner, the contents of which the Special

Inquiry Officer refused to disclose to the Petitioner and his attorney'', which is admitted; and, further, the Respondent says that the hearings accorded Petitioner were in accordance with the procedural requirements of the Immigration and Nationality Act of 1952, Title I, Sec. 242 (b), 66 Stat. 208, 8 U.S.C.A. 1252(b), and with the regulations promulgated thereunder, 8 CFR 242 et seq.

XI

Respondent denies the allegations contained in the first sentence of paragraph XI of the Petition, and says that the charge in the warrant in this respect was inaccurate only in its descriptive designation of the crime and not in substance. The Respondent admits the allegations contained in the second sentence of paragraph XI but submits, if the same becomes material, that the lodged charge merely corrected an error of form and was a ''new charge'' only in the most limited sense of the term.

XII

Respondent admits the allegation that the Special Inquiry Officer refused to hear oral argument as such on the Petitioner's motion to quash or dismiss the deportation proceedings, but says that the Special Inquiry Officer ruled thereon after examination of said motion and, further, that counsel for Petitioner presented each of his objections separately during the hearing and obtained rulings thereon.

XIII

Respondent denies all the allegations of paragraph XIII of the Petition, including the allegations contained in all subdivisions of said paragraph.

XIV

Respondent admits the allegations contained in paragraph XIV of the Petition.

XV

Respondent denies the allegations contained in paragraph XV of the Petition.

XVI

Further answering, the Respondent says that:

A. The Petitioner is being lawfully detained under a valid warrant of deportation;

B. The Petitioner was afforded a fair and impartial hearing before a duly authorized hearing officer of the Immigration and Naturalization Service;

C. The findings of the hearing officer were based upon substantial evidence of probative value;

D. The actions of the officials of the Immigration and Naturalization Service were in conformity with law and were based upon a proper interpretation of the statutes involved.

Wherefore, the Respondent respectfully requests that the Petition for Writ of Habeas Corpus be dismissed.

HENRY NICOLLS,
District Director Immigration
and Naturalization Service
Boston, Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. Boston, December 22, 1953.

Then personally appeared the above-named Henry Nicolls, District Director, Immigration and Naturalization Service, United States Department of Justice, and made oath that the above statements are true to the best of his knowledge and belief.

Before me,

Notary Public

My commission expires:

Motion to Amend Respondent's Return.

Now comes the Respondent and moves to amend its Return by substituting in place of paragraph VI the following:

> Respondent denies the allegations of the first two sentences of paragraph VI of the Petition, and says that the record shows that the Petitioner has been convicted of the crime of larceny, as alleged in the warrant of deportation. With respect to the allegations contained in the third sentence of said paragraph, the Respondent admits that a motion for a new trial was filed on February 4, 1953, on which motion the decision was reserved on February 15, 1953, but says further that on December 23, 1953, said motion was denied by the Court.

HENRY NICOLLS,
District Director, Immigration and Naturalization Service, Boston, Massachusetts

ANTHONY JULIAN
United States Attorney
By: JEROME MEDALIE
Assistant U. S. Attorney
Attorneys for the Respondent

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. BOSTON, January 4, 1954.

Then personally appeared the above-named Jerome Medalie, Assistant U. S. Attorney, and made oath that the above statements are true to the best of his knowledge and belief.

Before me,

Notary Public

My commission expires:

CERTIFICATE OF SERVICE

SUFFOLK, ss.

BOSTON, MASSACHUSETTS
January 4, 1954

I, Jerome Medalie, Assistant U. S. Attorney, hereby certify that I have this day handed a copy of the within Motion to Paul T. Smith, attorney for the petitioner, in open court.

JEROME MEDALIE
Assistant U. S. Attorney

Portions of Return Submitted by Respondent in Response to Petitioner's Motion.*

WARRANT FOR ARREST OF ALIEN

UNITED STATES OF AMERICA
Department of Justice
Washington

No. E-1356

To Chief, Investigations Section, Boston, Massachusetts
Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Anthony Pino who entered this country at the Port of Boston, Mass. ex S.S. Romanic on the 25th day of May 1908 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

---

*Matter under this heading was furnished by respondent pursuant to petitioner's motion "that the respondent be ordered to correct his return by incorporating therein the record of proceedings . . ." This is erroneously characterized by the court below and in the docket entries as a "motion to produce." See pages 35-38, incl., of Transcript of Record of Hearing January 4, 1954, not printed.

Section 241(a)(4) of the Immigration and Nationality Act, in that, he at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: assault with intent to rape and rape; and larceny.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1953."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 5th day of January 1953.

Acting District Director—Boston

Port of Boston Mass.
Date Jan 10, 1953

WARRANT FOR ARREST OF ANTHONY PINO

Served by me at Wollaston Mass on Jan 10, 1953, at 8
Boston Mass
am. Alien was then informed as to cause of arrest, the conditions of release as provided therein, advised as to right of counsel and furnished with a copy of this warrant.

MARTIN R SCHOFIELD

Conditions of release if eligible

Complied with the alien registration Act of 1940 and assigned Number A 2-136-979.

EMILE F. LE VIN
Investigator Boston District.

[Portions of Transcript of Hearing before the Special Inquiry Officer, Dated January 28, 1953, Examination of Anthony Pino (Lawrence F. O'Donnell, Attorney of Record).]

• • •

(2)

Q. Are you ready to proceed with the hearing at this time? A. No.

Q. What is your reason for saying, "No"? A. We respectfully request a continuance, under the circumstances of this case, for purposes of allowing the general notoriety associated with it to subside a reasonable time and more time to prepare by virtue of the fact that the McCarran Act is comparatively recent legislation and difficult points within the McCarran Act are yet to be resolved.

(3)

Q. For your information, any decision entered in this case by me will not be predicated on any notoriety that the respondent may receive, but solely on the evidence presented and developed during the hearing. Every opportunity will be furnished you to prepare your defense in this case. Do you understand? A. I do.

Q. Your motion is denied at this time. Do you understand?

Is it seasonable at this time to take an exception to the denial.

• • •

(7)

Q. What was the outcome of the various deportation proceedings granted you? A. I think it was continued to see if I could get a pardon and I received a pardon on one felony that time. As a result of the pardon, the proceedings were terminated on the grounds that I was not deportable.

(8)

Q. On the basis of your discussion of felonies, it is concluded by the Special Inquiry Officer that you have been arrested in civil or criminal proceedings. Offhand, can you tell me about how many times you have been arrested?

By Counsel: I was wondering if I might interject here. For purposes of information, I was wondering how extensive the pursuit of that information would be. In light of Section 241(a)(4) setting out the two particular violations that he is confronted with now, is it necessary to go into the entire record at this time?

By Special Inquiry Officer: The question is deemed necessary in arriving at a decision in this case and it is requested that the respondent answer to the best of his ability.

By Counsel: That would go beyond the charges listed here.

By Special Inquiry Officer: That is correct.

By Counsel: I take an exception of going beyond what is listed here, on the grounds that it could be prejudicial to the respondent.

By Special Inquiry Officer: A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act. The objection is overruled.

Special Inquiry Officer to Respondent: Q. It is requested that the respondent answer the question. How many times have you been arrested? A. Quite a few; I couldn't say the exact amount.

Q. I show you a complete photostatic report of the Massachusetts Board of Probation, in the case of Toney Peno, Antonio Pino, or Anthony Pino. After you have examined this record, advise me if it relates to you. (Recess declared while respondent and counsel examine document.) A. Yes, to the best of my knowledge.

(9)

Q. This photostatic copy of the Massachusetts Board of Probation, together with decoded copy thereof, will be made a part of the record as Exhibit #3. Is this understood? A. Yes.

Q. I show you a report from the Identification Division of the Federal Bureau of Investigation bearing the F.B.I. number 169123, dated January 27, 1949, which is the latest available to me at this time. After an examination of this document, advise me whether or not it relates to you?

> (Recess permitted by Special Inquiry Officer for purpose of consultation between respondent and counsel.)

By Counsel: This record of January 31, 1949, received by the Immigration authorities, relates to Mr. Pino but he does not necessarily acknowledge its contents.

Special Inquiry Officer to Respondent: Q. This report from the Federal Bureau of Investigation is made a part of the record as Exhibit #4. Do you understand? A. Yes, sir.

Q. I show you a certified copy of conviction in the case of the Commonwealth vs. Anthony Pino, docket No. 8649, Third District Court of Eastern Middlesex, Cambridge, Massachusetts, consisting of a complaint charging Anthony Pino with larceny; and court docket wherein a plea was originally entered of not guilty and a judgment of guilty was found on December 23, 1948 from which an appeal was taken; and which also contains the entry that on December 28, 1948 appeal was withdrawn by leave of court and on the same day a motion for a new trial was allowed and the finding revoked; on January 4, 1949 there was a judgment of guilty and a sentence of one year in the House of Correction; appealed on January 10, 1949; January 28, 1949 appeal withdrawn by leave of court and original sentence of one year in the House of Correction suspended; last entry on the docket showing January 30, 1950 sentence revoked and matter placed on file. Does this record relate to you? A. Yes.

By Counsel: This certified copy relates in part to the stealing of twelve golf balls of value less than $100.

(10)

Special Inquiry Officer to Respondent: Q. This document is entered into the record as Exhibit #5. Is this understood by the respondent? A. Yes, sir.

Q. I show you a certified copy of conviction, Docket number 1586 of 1928, Superior Court, Boston, Massachusetts, consisting of an indictment of Anthony Pino and others for abuse of a female child; and court record showing that the indictment was found January 9, 1928; and January 16, 1928, Pino pleaded guilty to said indictment; January 17, 1928, after part of testimony was introduced, said Pino was called in said court and was defaulted; March 15, 1928, said Pino was again tried by a petit jury; March 20, 1928, said jury returned a verdict that said Pino was guilty of said indictment; March 29, 1928, Pino for the crime set forth in the indictment was sentenced to be committed to the Massachusetts Reformatory, Concord, Massachusetts for a term of five years and one day. After examining this document, please advise me if it relates to you? A. Yes.

Q. This document is made a part of the record and marked Exhibit #6. Do you understand? A. Yes.

Q. As you and counsel were previously advised you would be offered a reasonable opportunity to examine the evidence in this case, which consists of Exhibits #5 and #6, it is now made available to you for further examination. A. (By counsel): Thank you, we have examined.

Q. In view of the evidence now at hand, I charge you with being in the United States in violation of Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny. Do you understand the nature of the new charge lodged against you? A. Yes, sir.

Special Inquiry Officer to Counsel: Q. Under the existing regulations which flow from the Immigration and Nationality Act, when a new charge is lodged during the course of a proceeding, counsel may request an adjournment for the purpose of preparing his defense on the new charge. A. I so request and, first of all, request your indulgence while I have a conference with my esteemed associate here.

(Recess permitted by Special Inquiry Officer for purpose requested.)

• • •

[PORTIONS OF TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED FEBRUARY 10, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).]

(17)

Counsel: It would be warrantable for counsel to make such a motion and ask that two officers be assigned, one in judgment and one for presenting the evidence.

Special Inquiry Officer: Motion is denied. We shall proceed with the hearing.

• • •

Q. You are requested to advise whether or not this current record from the Federal Bureau of Investigation relates to you? A. Yes.

Counsel: May I examine it?

Special Inquiry Officer: Yes.

(Report examined by both attorneys.)

Special Inquiry Officer: The Federal Bureau of Investigation report, dated January 27, 1953, is entered into the record as Exhibit #4(a).

* * *

[Portions of Transcript of Hearing before the Special Inquiry Officer, Dated February 16, 1953, Examination of Anthony Pino (Lawrence F. O'Donnell, Attorney of Record).]

(30)

Counsel: When I speak about the evidence now, am I to have an opportunity to examine the file, before you for the purpose of presenting the evidence for the Government, other than in capacity as a judge. I would like an opportunity to examine the file.

Special Inquiry Officer: Counsel will not have the opportunity to examine the file. Counsel will have the opportunity to examine the record file, if he desires.

Counsel: Isn't that file in front of you, that you have been referring to constantly, evidence against the respondent?

Special Inquiry Officer: The evidence against the respondent is as was stated, namely, Exhibits #5 and #6 of this proceeding.

Counsel: Well, I would just like to say for the record that the folder referred to by me in the above statement, on the desk in front of the Special Inquiry Officer in his capacity as prosecutor, is at least two or three inches thick and the exhibits couldn't constitute one-sixteenth of an inch. Therefore, I am without all the evidence because that has been referred to more times than the exhibits.

* * *

(31)

Counsel: It is not up to me. I notice the particular construction of that question, wholly irrelevant in my opinion. I want an opportunity to examine all the evidence that was used and the people that produced it against the respondent, as a result of the warrant of arrest dated January 10th, 1953.

Special Inquiry Officer: I have answered all those questions before.

* * *

[PORTIONS OF TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED MARCH 6, 1953, EXAMINATION OF ANTHONY PINO (PAUL T. SMITH AND MANUEL KATZ, ATTORNEYS OF RECORD).]

(48)

Let the record also show that on March 2, 1953, Associate Counsel Manuel Katz filed a request with the Special Inquiry Officer that subpoenas be issued directing the appearance of the Acting District Director at the hearing, in order that the defense might establish he had no authority to issue the warrant in question; that he could not possibly have determined that a prima facie case of deportation had been established on the grounds contained in the warrant of arrest; that he had no authority to assign the hearing to the Special Inquiry Officer; and that the duties of the Special Inquiry Officer, assigned to conduct the hearing, include investigations of cases similar to the instant one. Let the record show that under date of March 4, 1953, the Special Inquiry Officer denied the request, stating his reasons therefor.

* * *

(49)

Counsel: May counsel be furnished the application for warrant?

(Application for warrant handed to counsel by Special Inquiry Officer.)

May it be understood before proceeding that the respondent, through counsel, objects and takes exception to the rulings made, dated March 4, 1953, signed by T. J. Geoffrion, Special Inquiry Officer, in response to an application and motion by counsel for the respondent.

Special Inquiry Officer: Exception noted.

* * *

(50)

Counsel: At this point, may counsel for the respondent —Counsel for the respondent demands the production of Ralph J. Doyle, Chief, Investigations Section, who on Exhibit #8 states that he, "Respectfully recommends that a warrant be issued under the authority of the Attorney General."

Special Inquiry Officer: Request denied.

Counsel: Exception.

Counsel: May it be agreed that Ralph J. Doyle, Chief, Investigations Section, is employed by the Department of Justice, Immigration and Naturalization Service and has an office in the building wherein this hearing is being held?

Special Inquiry Officer: It is so agreed.

Counsel: May it be agreed that he would be available, if the Special Inquiry Officer ordered his appearance here?

Special Inquiry Officer: It is so agreed, as far as can be determined at this time.

Counsel: May it be agreed that the denial of the request of counsel is not on the basis that he may be here at this time?

Special Inquiry Officer: That is correct.

(51)

Counsel: May it appear on the record that the basis of the issuance of an application for a warrant was an allegation that the alleged alien had been allegedly convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: Assault with intent to rape and rape; and larceny.

Special Inquiry Officer: It is so agreed.

Counsel: May it also be agreed that the respondent, Anthony Pino, was at no time convicted of assault with intent to rape and rape?

Special Inquiry Officer: It is so agreed, as far as the record shows.

Counsel: May it be agreed that the records that were available to Ralph J. Doyle, Chief, Investigations Section, did not show any conviction of assault with intent to rape and rape?

Special Inquiry Officer: It will be so agreed.

Counsel: May counsel have Exhibit #4(a)?

> (Exhibit #4(a) handed to counsel by Special Inquiry Officer.)

The respondent now moves that Exhibit #4(a), which purports to be an official report of the Federal Bureau of Investigation, be expunged from the record.

Special Inquiry Officer: Motion denied.

Counsel: Exception.

Special Inquiry Officer: Exception noted.

(52)

Counsel: May it be agreed that this Exhibit #4(a) is not being used for the purposes of establishing the alleged conviction of the two crimes involving moral turpitude?

Special Inquiry Officer: It will be agreed that the report of the Federal Bureau of Investigation is not the specific evidence upon which the case rests or upon which a decision may be reached. Exhibit #4(a) has been made a part of the record as cumulative evidence.

Counsel: Respondent objects to that characterization and takes exception thereto.

Special Inquiry Officer: Exception noted.

Counsel: May it be agreed that this is a false statement, in that it alleges that Anthony Pino was convicted on March 29, 1928, of the crime of intent to rape and rape?

Special Inquiry Officer: It is necessary to qualify the answer before entering any agreement, as the report itself states by footnote that the entry referred to is not based on fingerprints in the FBI files. It is reported solely on the basis of data furnished the Bureau concerning individuals of the same or similar names or aliases and is listed only as investigative leads. In that respect, it is agreed that the information may not be accurate.

Counsel: Demand is hereby made for the production of the person or persons who allegedly furnished the data to the Bureau, upon which this report was based, and which recites that Anthony Pino was found guilty of a crime which the Special Inquiry Officer has ruled he has not committed.

Special Inquiry Officer: Demand is denied. That particular crime is not an issue before the Special Inquiry Officer.

• • •

(55)

Counsel: Counsel requests the production of the so-called probation record of Anthony Pino.

(Probation record handed to counsel by Special Inquiry Officer.)

Counsel now moves that Exhibit #3, which purports to be a probation report or a report of the Probation Department of the Commonwealth of Massachusetts, be expunged from the record.

Special Inquiry Officer: Motion denied.

Counsel: Objection and exception.

Special Inquiry Officer: Noted.

Insofar as the counsel has made an objection and an exception, where this has occurred, the objection is overruled and the exception is noted.

Counsel: May it be agreed that as a matter of law the Acting District Director or the Chief Investigating Officer had no basis for issuing a warrant with respect to Anthony Pino, on the grounds that he had been convicted of the crime of rape or attempted rape?

Special Inquiry Officer: It will not be so agreed.

Counsel: Objection and exception.

Special Inquiry Officer: Objection overruled. Exception noted.

Counsel: We now demand again the production of the Assistant District Director so that he may be examined to determine, as a matter of law, he had no basis for issuing such a warrant.

(56)

Special Inquiry Officer: The demand or motion is denied for the reasons set forth in my answer of March 4, 1953, which is part of this record.

• • •

(57)

Counsel: May it be agreed that the Special Inquiry Officer, of his own volition and his own accord, filed new charges against Anthony Pino after the commencement of these proceedings?

Special Inquiry Officer: It is so agreed.

Counsel: May it be agreed that those new charges were filed as the result of the examination of documentary evidence contained in the files relating to prior deportation proceedings against Anthony Pino?

Special Inquiry Officer: It is not so agreed. It is necessary to expand on the answer. The evidence, upon which the additional charge was lodged, was the evidence developed and made a part of this record of hearing.

Counsel: May it be agreed that that evidence, that was developed and made a part of this hearing, was so developed by the Special Inquiry Officer?

Special Inquiry Officer: It is not so agreed. It was presented by the Special Inquiry Officer, as required by the provisions of the McCarran Act.

Counsel: Demand is now made to produce the person who furnished the information to the Special Inquiry Officer, so that he may be interrogated as to the basis of the information furnished to the Special Inquiry Officer.

Special Inquiry Officer: Demand denied.

Counsel: Objection.

Special Inquiry Officer: Objection overruled.

(58)

Counsel: May it appear for the record that the Special Inquiry Officer has before him, and has had before him since the commencement of this hearing, a file which appears to be about 2½ inches thick,

Special Inquiry Officer: It is more 1½ inches thick.

Counsel: which includes many documents and papers and that Special Inquiry Officer has, since the commencement of this proceeding, read through that file.

Special Inquiry Officer: On what does the counsel base that statement?

Counsel: On the evidence as it appeared in the transcript furnished to us by prior counsel.

Special Inquiry Officer: Special Inquiry Officer will agree that he has a file before him. He will agree to nothing else.

Counsel: Will Special Inquiry Officer, at some stage of this proceeding, agree to be interrogated as a witness for the respondent?

Special Inquiry Officer: Special Inquiry Officer will not.

Counsel: Will Special Inquiry Officer agree that prior to the commencement of these proceedings, he examined the file which is before him?

Special Inquiry Officer: To be perfectly honest with counsel, Special Inquiry Officer does not remember whether he did or not. On some cases, he does and on some cases, he does not, depending on the time allotted him for familiarizing himself with the case.

(59)

Counsel: Will Special Inquiry Officer agree that as a result of some time looking through the file, additional charges were filed against Pino in these proceedings?

Special Inquiry Officer: No, Special Inquiry Officer will not so agree for the obvious reason that the development of the hearing itself showed the necessity of lodging the charge.

Counsel: Wait a minute. We are not playing a game here. This man's rights, which involves greater rights than property rights or confinement in a prison, are involved here. Now, I have read through the transcript of the testimony of the hearing and there has been a considerable reluctance on the part of the Government to come forward and state the facts that are involved. Now, the Special Inquiry Officer well knows that he would know whether during prior hearings in this matter there was any testimony, other than questions put to Pino by yourself or by O'Donnell, and that it was only as the result of questions which you put to Pino that there was a change made in the charges and it follows as a natural logical consequence that you got that information from some other source and if you did get it from another source, you have investigated it yourself or else some one has furnished it to you and I think, in all decency and fairness, you should say you investigated it yourself or who investigated it for you but I think to say it was developed during the course of the hearing would be wholly inconsistent with what developed in the transcript of the testimony and I want to go on record, as counsel for the respondent, in saying that depriving us of the rights of cross-examination of persons, who allegedly or might have investigated this case, is depriving us of opportunity to determine who it was who investigated the alleged grounds for deportation and is wholly inconsistent with any philosophy of constitutional guarantees of jurisprudence in the United States; that as bad as the McCarran Act has been charged with being, it does not contemplate any star chamber proceeding.

Special Inquiry Officer: I will have to stop the further discussion by counsel on that score.

• • •

(60)

Counsel: Now, counsel wishes to present a respondent's motion to quash, or dismiss, these proceedings. There are 24 causes assigned for quashing, canceling, or dismissing these proceedings. I should like to take each one of them up with the Special Inquiry Officer because it is the feeling of the respondent, through counsel, that Special Inquiry Officer will realize and will find that the proceedings should be quashed, after listening to argument. I now file this motion and ask that it be made part of the record.

• • •

(61)

Special Inquiry Officer: With reference to the motion itself, the Special Inquiry Officer denies the motion at this time. I make available to respondent and to counsel copy of letter dated January 19, 1953, addressed to the Assistant Clerk, Third District Court, Middlesex County, Cambridge, Massachusetts, dealing with court record number 8649 (1948) and the answer thereto received from the Assistant Clerk of the court, dated January 29, 1953. This deals in part with the averments contained in paragraph number 20 of the motion.

Counsel: First, may it appear that respondent objects to the ruling of the Special Inquiry Officer denying the motion and takes exception therefrom.

Special Inquiry Officer: The objection is overruled. The exception is noted.

Counsel: Secondly, counsel for the respondent objects to the ruling of the Special Inquiry Officer that he will hear no argument on a motion.

Special Inquiry Officer: Objection is overruled.

Counsel: Exception.

Special Inquiry Officer: Exception is noted.

These two documents are made a part of the record and marked Exhibit #10.

Counsel: I object to that. * * *

* * *

(65)

Counsel: May I have Exhibit #10.

(Exhibit #10 handed counsel by Special Inquiry Officer.)

Demand is hereby made upon Special Inquiry Officer that Paul J. Cronin, Assistant Clerk, Third District Court of Eastern Middlesex, East Cambridge, Massachusetts, be brought in by subpoena.

Special Inquiry Officer: Demand denied.

Counsel: Objection and exception.

Special Inquiry Officer: Overruled and noted.

• • •

(72)

Special Inquiry Officer: The hearing is reconvened.

Counsel: Demand is hereby made upon the Special Inquiry Officer to produce any and all documents, memoranda, notes, or other matters, which were the basis from which the Special Inquiry Officer interrogated the respondent, Anthony Pino, in the prior hearings, so that counsel may examine such matters.

Special Inquiry Officer: The exhibits, which were entered into this record prior to the beginning of this session, are the basis upon which the questioning took place and they are now made available to counsel.

Counsel: May it be agreed that those were the only documents examined by the Special Inquiry Officer for the purpose of interrogating Mr. Pino?

Special Inquiry Officer: No such agreement will be entered into.

Counsel: Objection.

Special Inquiry Officer: Overruled.

Counsel: Exception.

Special Inquiry Officer: Noted.

Counsel: May it be agreed that there might have been other documents that were examined by the Special Inquiry Officer as the basis for his interrogation of Mr. Pino?

(73)

Special Inquiry Officer: No such agreement will be entered into.

Counsel: Objection.

Special Inquiry Officer: Overruled.

Counsel: Exception.

Special Inquiry Officer: Noted.

Counsel: May it be agreed that the file which is before the Special Inquiry Officer, exclusive of the exhibits which have been entered in this case, was examined by the Special Inquiry Officer as a basis in whole or in part for the examination of the respondent?

Special Inquiry Officer: No agreement thereon will be entered into.

Counsel: Objection.

Special Inquiry Officer: Overruled.

Counsel: Exception.

Special Inquiry Officer: Noted.

Counsel: I now formally make demand that the Special Inquiry Officer be sworn and testify in this proceeding. (74)

Special Inquiry Officer: Formal request denied.

Counsel: Objection.

Special Inquiry Officer: Overruled.

• • •

(78)

[Anthony Pino, respondent.] Then, from what I understand that there was a box of golf balls that was stolen and they had found them, or something, in Grant's Department Store and they held both of us until court the next morning. Then, I went to court and the case was continued a week, I think, or two and I was found guilty with Mr. Coleman and I had appealed the case because at that time, I had a pardon pending, so in town I went and seen my attorney that was representing me at that time on my pardon, Paul T. Smith, and he told me that there was no need of appealing because it has no bearings on your case, even if you are not guilty.

Counsel: That was on a deportation proceeding. I was not representing you on the pardon.

Respondent: That is right; on the deportation, not on the pardon. So, I withdrew my appeal and then I was granted a new trial and was given one year's suspended sentence, or something, and probation. I accepted this.

• • •

(79)

Counsel: Well, now, I want to digress for one moment. I note, in going over the exhibits, that there is an Exhibit #4 which purports to be a report of the Federal Bureau of Investigation and which was introduced in evidence, prior to our coming into the case, and I move that that exhibit be expunged from the record and give for the same reasons my motion to expunge Exhibit #4(a).

Special Inquiry Officer: Motion denied.

• • •

(83)

Counsel: Let it for the record show that the respondent at this time asks the Special Inquiry Officer if he intends to hear argument on respondent's motion to quash.

(84)

Special Inquiry Officer: Special Inquiry Officer will hear no argument thereon.

• • •

[LETTER DATED JANUARY 19, 1953, FROM HENRY NICOLLS BY WILLIAM F. WALL, U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, TO JAMES V. CULHANE, ASSISTANT CLERK, THIRD DISTRICT COURT OF EASTERN MIDDLESEX.]

E-1356
(WU)
January 19, 1953

Mr. James W. Culhane
Assistant Clerk, Third District Court
Middlesex County
Cambridge, Massachusetts

Dear Mr. Culhane:

In connection with pending deportation proceedings against one Anthony Pino, this office secured from your

Court a copy of the record of the alien's conviction of larceny which is identified as No. 8649 (1948).

This record indicates that the alien was convicted at your court on January 4, 1949, of the offense of larceny and sentenced to a year in the House of Correction from which the alien appealed on January 10, 1949. The following notation then appears on the copy of the court record which is in our possession:

"January 28, 1949 Appeal withdrawn by leave of Court and original sentence one year House of Correction suspended
January 30, 1950 appeal waived
Sentence revoked
On File"

Since this offense is one of those involved in the deportation proceedings it is important that we know the exact disposition of the alien's case on the occasion mentioned above. As the year covered by the suspended sentence had elapsed on January 28, 1950, this office is at a loss to understand why the case was not considered closed on that date. Instead, it appears that further action was taken in the matter on January 30, 1950, and we shall greatly appreciate it if you will furnish us information as to whether there was any motion for new trial or other action taken in this case subsequent to the withdrawal of the appeal on January 28, 1949.

If it is possible for you to furnish us a prompt reply in this matter, it will be helpful to us. I am enclosing for your convenience in replying a self addressed envelope which requires no postage.

Yours very truly

HENRY NICOLLS, District Director
By: William F. Wall
Acting Chief, Warrant Unit

Exhibit 10

[LETTER DATED JANUARY 29, 1953, FROM PAUL J. CRONIN, ASSISTANT CLERK OF THE THIRD DISTRICT COURT OF EASTERN MIDDLESEX, TO WILLIAM F. WALL.]

COMMONWEALTH OF MASSACHUSETTS
THIRD DISTRICT COURT OF EASTERN MIDDLESEX
EDWARD J. DEVER
Justice

Special Justices
Robert Walcott
Louis L. Green

Clerk
Charles T. Cavanagh
Ass't. Clerks
Paul J. Cronin
James W. Culhane
Joseph P. Coughlin

January 29, 1953

William F. Wall
U. S. Department of Justice
Boston 8 Massachusetts

Re: Anthony Pino
E-1356(WU)
Court No 8649 of 1948

Dear Mr. Wall:

In reply to your communication as of January 19, 1953, and our telephone conversation subsequent and thereto, please be advised that according to our records the above named Anthony Pino was placed on probation from January 28, 1949 to January 30, 1950 under a sentence of one year in the House of Correction, the execution of which was suspended during his probationary term. Upon January 30, 1950, the court ordered that the sentence of one year be revoked and the case be placed on file.

In further reply to your inquiry, please be informed that the finding of "guilty" still remains and was not revoked, that further, a case placed on file may thereafter be ordered, removed from the files and further considered by the court on the matter of the sentence being re-imposed. I hope this will clear the matter set forth on the certified copy and be assured for any further assistance you may call on me.

Very truly yours,
PAUL J CRONIN
G
Assistant Clerk

pjc/g
Ex 10

[Letter of March 2, 1953, to T. J. Geoffrion from Manuel Katz, Esq.]

March 2, 1953

Mr. T. J. Geoffrion
Special Inquiry Officer
U. S. Dept. of Justice
Immigration & Naturalization Service
73 Tremont Street
Boston 8, Mass.

In re: Anthony Pino—E-1356

Dear Sir:

Request is hereby made for the issuance of the following subpoenas duces tecum in the above matter which has been adjourned for hearing to Friday, March 6th, 1953, at 9:30 a.m.

I

A. Subpoenas duces tecum addressed to the Acting Director who issued the warrant for arrest in the instant case requiring him to produce at the hearing:

1. Any and all documents, papers, letters, regulations, memoranda and records showing his authority to issue the warrant for arrest in question.
2. The application for the warrant of arrest of the respondent.
3. Any and all documents, letters, papers, statements, memoranda and records showing the basis for his determination that a prima facie case for disposition had been established on the ground that the respondent shall "at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a singular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny".
4. Any and all documents, letters, papers, statements, memoranda and records showing his authority to assign this hearing to the Special Inquiry Officer.
5. Any and all documents, letters, papers, regulations, memoranda and records showing the duties of T. J. Geoffrion in this as well as other cases.

B. The purpose of the request for this subpoena is to establish through the Acting District Director:

1. That he had no authority to issue the warrant in question.
2. That he could not possibly determine that a prima facie case for deportation had been established on the grounds that the respondent "at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a sin-

gular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny''.

3. That he had no authority to assign this hearing to the Special Inquiry Officer.
4. That the duties of the Special Inquiry Officer assigned to conduct this hearing include investigations of cases similar to the instant case.

II

A. Subpoena duces tecum addressed to the Investigating Officer applying for the warrant of arrest in question requiring him to produce at the hearing any and all documents, papers, letters, statements, memoranda and records showing the basis upon which he determined that a prima facie case for deportation of the respondent existed on the grounds that the respondent ''at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a singular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny''.

B. The purpose of the request for this subpoena is to establish through the Investigating Officer:

1. That he could not possibly determine that a prima facie case for deportation had been established on the grounds that the respondent ''at any time after entry has been convicted of two crimes involving moral turpitude not arising out of a singular scheme or criminal misconduct, to wit: Assault with intent to rape and rape; and larceny''.

Respectfully submitted,

MANUEL KATZ
Attorney for Respondent,
Anthony Pino

MK:d

[DECISION BY T. J. GEOFFRION, SPECIAL INQUIRY OFFICER, DATED MARCH 4, 1953, RE APPLICATION FOR SUBPOENAS.]

U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
73 Tremont Street
Boston 8, Massachusetts

File: E-1356 Boston　　March 4, 1953

In re: ANTHONY PINO

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Manuel Katz, Attorney at law, (Associate Counsel) 209 Washington Street, Boston, Mass.

APPLICATION: Request for subpoenas to be addressed to the Acting District Director and to the Investigating Officer who applied for warrant of arrest.

DISCUSSION: This is a request, addressed to the undersigned under date of March 2, 1953, seeking to have:

(a) The Acting District Director produce at hearing:

1. Documents, papers, letters, regulations, memoranda and records showing authority to issue warrant of arrest;
2. Application for warrant of arrest;
3. Documents, letters, papers, statements, memoranda, et cetera, showing basis for determination that a prima facie case had been established that the respondent had been convicted, after entry, of two crimes involving moral turpitude, et cetera, to wit: Assault with intent to rape and rape; and larceny;
4. Documents, letters, records, et cetera, showing authority to assign hearing to the Special Inquiry Officer;

5. Documents, letters, papers, regulations, et cetera, showing the duties of the undersigned in this case, as well as other cases; and

(b) The Investigating Officer applying for warrant of arrest to produce at hearing any and all documents, papers, statements, et cetera, upon which he determined that a prima facie case for deportation existed, on the grounds that the respondent, after entry, had been convicted of two crimes involving moral turpitude, et cetera: Assault with intent to rape and rape; and larceny.

Counsel for the respondent alleges that the Acting District Director had no authority to issue the warrant in question; that it could not be possibly determined that the respondent was deportable on the charges listed: Assault with intent to rape and rape; and larceny; that he had no authority to assign this hearing to the Special Inquiry Officer; and, finally, that the duties of the Special Inquiry Officer assigned to conduct this hearing includes investigations of cases similar to the instant case.

Counsel contends further that the Investigating Officer applying for the warrant of arrest could not possibly determine that a prima facie case for deportation had been established on the grounds that the respondent had been convicted of two crimes involving moral turpitude, after entry: Assault with intent to rape and rape; and larceny.

Counsel prays that these two persons, with their respective records, be produced at hearing so that these facts can be established and Special Inquiry Officer has given this request careful consideration.

Counsel is referred to the law, namely, the Immigration and Nationality Act, which became effective December 24, 1952, and to the Immigration and Naturalization Regulations which have been published on December 19, 1952, as

Title 8, Code of Federal Regulations. Both the law and the regulations are available to the public. There is contained therein the full authority concerning the issuance of immigration warrants of arrest, the authority to assign hearings to Special Inquiry Officers, and the limitations which are placed on the activities and duties of Special Inquiry Officers.

Counsel may, on request during the hearing, be shown the authority and certificate of appointment under which the Special Inquiry Officer operates.

There is on file an acknowledgment dated February 26, 1953 from the associate counsel, who has made this request, that he has received a transcript of previous hearings granted in this proceeding during the course of which the counsel of record was advised of the basis on which the warrant of arrest was issued. Counsel at time of next hearing may, if he so desires, request that the application for warrant of arrest be presented for his scrutiny and this can be made available to him.

The issue in the hearing, of which counsel has a transcript, is solely whether the respondent is subject to deportation on the charge lodged at hearing as supported by certified copies of conviction, which were entered into evidence as Exhibits #5 and #6. The lodging of an additional charge during the course of hearing is based on the legal authority contained in Section 242.53(d), Title 8, Code of Federal Regulations. It is not fatal to the issue of deportability if there is a deficiency in the warrant of arrest, providing that sufficient affirmative evidence is presented to sustain a deportation charge (Toku Sakai v. U.S., 239 Fed. 492 (CCA 9, 1917). Failure to issue new warrant on added charge against alien is cured where alien is summonsed before officer and notified of additional charge against him and is given full opportunity to be heard thereon. U.S. ex rel. Boric v. Marshall, D.C. Pa. 1933, 4 F. Supp.

965, appeal dismissed CCA 1933, 67 F. 2d 1920, certiorari granted, 1933, 54 S. Ct 345, 290 U.S. 623, 78 L. Ed. 543, certiorari dismissed, 1935, 54 S. Ct. 371, 290 U.S. 709, 78 L. Ed. 609.

Decision: The request for the issuance of subpoenas requiring the attendance of the Acting District Director and of the Investigating Officer applying for the warrant of arrest in this case, is denied.

T J GEOFFRION
T. J. Geoffrion
Special Inquiry Officer

COPY BOUND C

[MASSACHUSETTS RECORD INTRODUCED BY SPECIAL INQUIRY OFFICER.]

NO, TONEY 500 · Born Mo. 5 Day 10 Yr. 1907

AME			ADDRESS	
Peno, Toney			a. 579 Dorchester Ave.	
Pino, Antonio			b. 33 Kennebec St., Mattapan	
Pino, Anthony			c. 58 Port Norfolk, Neponset	
			d. 3 Fuller St., Dorchester	
IRTHPLACE	HT.	WT.	COMP.	H. or W.
Italy	5/7	210	Med.	

CCUPA.

ounterman Restaurant Owner
hauffeur Truckman
rocer-Messenger

PARENTS

1. Frank
2. Kate Irenna
3. Cath. Arena
4. Catherine

ATE	OFFENCE	COURT	DISPOSITION
ar. 31,1923	Obstructing Traffic	South Boston	Filed
ay 20,1925	Unlawful appropriation auto	Boston Municipal	6 mos.House Correction suspended sentence 5-21-26
ay 28,1926	No license	Dorchester	6-7 Filed
uly 15, 1926	Not slowing down	West Roxbury	$15 suspended sentence7-29-26
pril 15,1927	Speeding	Roxbury	$10 paid
ug. 4, 1927	Restricted Street	Boston Municipal	$5
ov. 15,1927	Burglar Tools	Roxbury	Bound Over
ov. 25,1927	Abuse of Female Child	Boston Municipal	12-9 Grand Jury
ec. 12,1927	Possessing Burglar Tools	Suffolk Superior	No Bill
ec. 21,1927	Speeding	Roxbury	$15 committed
ar. 29,1928	Abuse Female Child	Suffolk Superior	Massachusetts Reformatory 5 years 1 day
ct. 29,1930	Paroled 3-29-33	Massachusetts Reformatory (Concord)	Gavin
ov. 10,1931	Suspicious Person	Fall River	11-12 11-18 11-27 Dismissed
ov. 11,1931	Attempted breaking & entering	Fall River	11-18 11-27 Dismissed
ept. 3,1932	Metropolitan District Com.rules	Dorchester	Filed
an. 16,1933	Accessory before fact Breaking and Entering, day time	Boston Municipal	1-24 1-31 Probable cause
une 21,1933	Not slowing down	East Boston	$5 paid
une 18,1934	Speeding	Taunton	$5 paid
an. 6,1936	Conspiracy to break and enter	Boston Municipal	1-16 1-31 Probable cause
an. 16,1936	Alien possessing firearms	Boston Municipal	1-31 Discharged
an. 17,1936	Fugitive from N.H. Robbery	Boston Municipal	1-23 2-28 Default
an. 29,1936	Speeding	Worcester	$10 paid
eb. 13,1936	Conspiracy to break and enter	Suffolk Superior	No bill
ar. 4,1936	Default removed 1-17-36	Boston Municipal	3-26 Default
pr. 3,1936	Default removed	Boston Municipal	4-11 4-17 5-4 5-18 5-25 Discharged
eb. 18,1937	Conspiracy to steal	South Boston	2-25 3-11 3-16 Grand Jury
pr. 13, 1937	Conspiracy	Suffolk Superior	No Bill
ov. 27,1937	Possessing Burglar Tools	Boston Municipal	12-8 Dismissed Want of Prosecution Indicted
an. 6,1938	Breaking & Entering Building Day time with intent to steal	Suffolk Superior	3-4 years State Prison-Indicted
an. 6,1938	Conspiracy to break and enter	Suffolk Superior	On file after sentence-Indicted
an. 6,1936	Possessing Burglar Implements	Suffolk Superior	3-4 years State Prison from and after-Indicted

EXHIBIT #3.

CLOSE IN CENTER

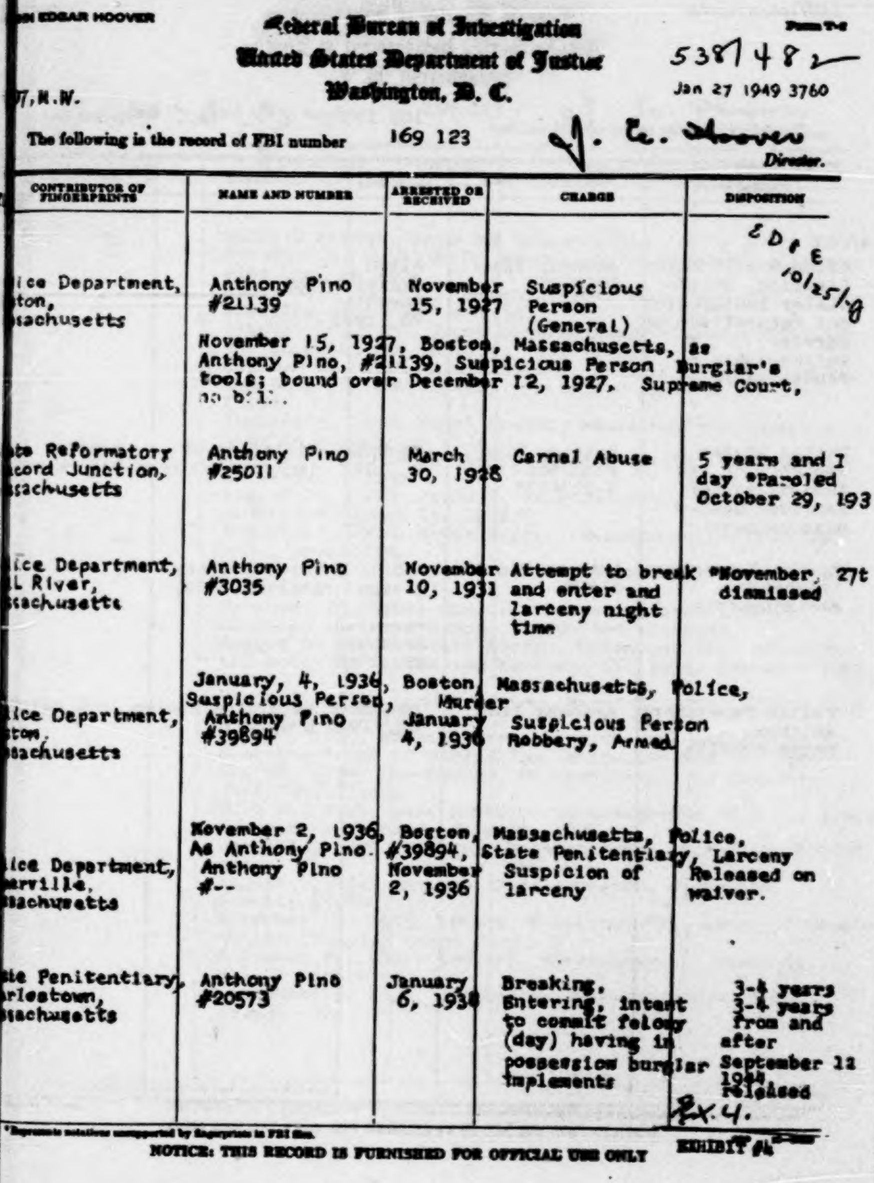
PENO, Toney
PINO, Antonio
PINO, Anthony

DATE		COURT	DISPOSITION
Sept. 12,1944	Paroled 1-5-46	State Prison	(Charlestown
July 12,1946	Speeding	Dorchester	$5.00
Dec. 3,1948	Larceny	Cambridge	12-23 12-24 1 year House of Correction-Appealed
Jan. 28,1949	Appeal Withdrawn 12-8	Cambridge	1 year House of Correction Suspended Sentence 1-30-50 f
Sept. 6,1949	Full and complete pardon by Governor and Council two cases of 1-6-38 (Breaking and entering daytime to commit a felony and possessing burglar tools).		
July 5,1950	Violation fish and game law	Barnstable	$10 paid

EXHIBIT #3.

COPY BOUND CL

[FEDERAL BUREAU OF INVESTIGATION REPORT INTRODUCED BY SPECIAL INQUIRY OFFICER.]



n EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

7, N.W.

Form

5387482

Jan 27 1949 3760

The following is the record of FBI number 169 123

J. E. Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
ice Department, ton, sachusetts	Anthony Pino #21139	November 15, 1927	Suspicious Person (General)	EDFE 10/25/8
	November 15, 1927, Boston, Massachusetts, as Anthony Pino, #21139, Suspicious Person Burglar's tools; bound over December 12, 1927, Supreme Court, no bail.			
te Reformatory cord Junction, sachusetts	Anthony Pino #25011	March 30, 1928	Carnal Abuse	5 years and 1 day *Paroled October 29, 193
ice Department, L River, sachusetts	Anthony Pino #3035	November 10, 1931	Attempt to break and enter and larceny night time	*November, 27t dismissed
	January, 4, 1936, Boston, Massachusetts, Police, Suspicious Person, Murder			
ice Department, ton, sachusetts	Anthony Pino #39894	January 4, 1936	Suspicious Person Robbery, Armed	
	November 2, 1936, Boston, Massachusetts, Police, As Anthony Pino #39894, State Penitentiary, Larceny			
ice Department, erville, sachusetts	Anthony Pino #--	November 2, 1936	Suspicion of larceny	Released on waiver.
te Penitentiary, rlestown, sachusetts	Anthony Pino #20573	January 6, 1938	Breaking, Entering, intent to commit felony (day) having in possession burglar implements	3-4 years 3-4 years from and after September 12 1944 Released

Ex. 4.

*Represents notations unsupported by fingerprints in FBI files.

NOTICE: THIS RECORD IS FURNISHED FOR OFFICIAL USE ONLY

EXHIBIT #4

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A-46

JOHN EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

The following is the record of FBI number 169 123

J. E. Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Alien Registration Division, United States Immigration and Naturalization Service, Philadelphia, Pennsylvania.	Anthony Pino. #2136979	Alien Registration March 28, 1941		
United States Immigration and Naturalization Service, Boston Massachusetts	Anthony Pino #538/482- A-2136979	December 6, 1941	Violation of Immigration Laws	Pending Deportatio
Police Department, Arlington, Massachusetts	Anthony Pino #1495	not given (print received December 20, 1948	larceny (less than $100.00)	
Police Department, Waltham, Massachusetts	Anthony Pino #--	December 23, 1948	receiving stolen property	not guilty

---

* Represents notations unsupported by fingerprints in FBI files.

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A-47

HN EDGAR HOOVER

ederal Bureau of Investigation, United States Department of Justice Washington, D. C.

Form T-6

The following is the record of FBI number 169 123

J. E. Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

Suffolk School, Breaking and entering. one on print #25011
October 23, 1915, South Boston, Massachusetts, stealing ride car; on file.
September, 30, 1916, South Boston, Massachusetts, stealing ride car; on file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and larceny, (2); file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and Larceny, probation January 13, 1917, filed.
January 1, 1918, South Boston, Massachusetts, playing ball in street; on file.
June 1, 1918, South Boston, Massachusetts, playing ball in street. filed.
August 15, 1918, Roxbury, Massachusetts, Larceny; probation August 14, 1919.
August 17, 1918, South Boston, Massahhusetts, stealing ride, probation.
October 25, 1918, South Boston, Massachusetts, larceny, Suffolk School.
November 25, 1921, Roxbury, Massachusetts, larbeny, December 1, Lyman School, suspended sentence.
August 12, 1922, South Boston, Massachusetts, breaking and entering; probation November 11, 1922; November 20th filed.
March 31, 1923, South Boston, Massachusetts, obstructior traffic; on file.
May 20, 1925, Boston, Massachusetts, use without auto; 6 months House of Correction, suspended May 21, 1926.
May 28, 1925, Dorchester, Massachusetts, no license; June 7th, filed.
July 15, 1926, West Roxbury, Massachusetts, N.S.D.; $15.0 sentence suspended, July 29, 1926.
April 15, 1927, Roxbury, Massachusetts, speeding, $10.00 paid.
August 4, 1927, Boston, Massachusetts, restricted street; $5 CO paid.
November 25, 1927, Boston, Massachusetts, abuse of female child; December Grand Jury.
December 21, 1927, Roxbury, Massachusetts, speeding, $15.00 committed.
September 3, 1932, Dorchester, Massachusetts, M.D.C., filed

*Represents notations unsupported by fingerprints in FBI files.

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A-48

JOHN EDGAR HOOVER

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

Form

The following is the record of FBI number 169 123

J. E. Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

January 11, 1932, Boston, Massachusetts, as Anthony Pino, #30994, suspicious person, breaking windows.
January 16, 1933, Central, Boston, Massachusetts, Breaking and entering daytime, 2 years House of Correction, appealed (December 4, 1933 not guilty)
January 16, 1933, Central Court, Boston, Massachusetts Accessory before the fact and breaking and entering, probable cause.

night.
June 3, 1933. Boston, Massachusetts, Police, as Anthony Pino, #30994, Suspicious Person, Breaking and entering, night.
June 21, 1933, East Boston, Massachusetts, Police not slowing down, $5.00 paid.
May 4, 1934, Boston, Massachusetts, Police, as Anthony Pino, #30994 Suspicious Person, robbery armed.
June 18, 1934, Taunton, Massachusetts, Speeding, $5.00, paid.
January 23, 1935, Boston, Massachusetts, Police, as Anthony Pino, #0994. Suspicious Person, Robbery armed, released.
February 13, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994. Suspicious Person, breaking and entering.
March 9, 1935, Boston, Massachusetts, Police, as Anthony Pino, #30994 Suspicious Person, breaking and entering, store; released.
March 11, 1935, Boston, Massachusetts, Police, as Anthony Pino #30994, Suspicious Person, safe job, released.
January 15, 1936, Boston, Massachusetts, Police, as Anthony Pino, #39894. Suspicious Person, robbery armed.
February 13, 1936, Boston, Massachusetts, Police, as Anthony Pino, #BR-2587. Suspicious Person, robbery armed.
October 9, 1936, Boston, Massachusetts, Police, as Anthony Pino, #39894 Suspicious Person, armed robbery.

* Represents notations unsupported by fingerprints in FBI files.

NOTICE: THIS RECORD IS FURNISHED FOR OFFICIAL USE ONLY

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A-49

JOHN EDGAR HOOVER

Form I-4

Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

The following is the record of FBI number 169 123

J. E. Hoover
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

As Anthony Pino, #1495, Police Department, Arlington, Massachusetts, December 6, 1948, larceny (less than $100.00); on December 8, 1948 case was continued to December 13, 1948.

As Anthony Pino, #1495, Police Department, Arlington, Massachusetts, December 6, 1948 larceny (over $100.00 from persons unknown); on December 8, 1948 continued to December 13, 1948.

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* Represents notations unsupported by fingerprints in FBI files.

GPO [illegible]

NOTICE: THIS RECORD IS FURNISHED FOR OFFICIAL USE ONLY

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A-50

[FEDERAL BUREAU OF INVESTIGATION REPORT INTRODUCED BY SPECIAL INQUIRY OFFICER.]

RECEIVED
JAN 30 1953
Office of the District Director
U. S. Immigration & Naturalization
73 Tremont Street
Boston, Mass.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

1-27-53 ph

J. Edgar Hoover
Director.

The following FBI record, NUMBER 169 123, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
lice Department, ston, sachusetts	Anthony Pino #21139	November 15, 1927	Suspicious Person (General)	
	November 15, 1927, Boston, Massachusetts, as Anthony Pino, #21139, Suspicious Person, Burglar's tools; bound over December 12, 1927, Supreme Court, no bill			
te Reformatory, ncord Junction, sachusetts	Anthony Pino #25011	March 30, 192	Carnal Abuse	5 years and 1 day *Paroled October 29, 1
lice Department, ll River, sachusetts	Anthony Pino #3035	November 10, 193	Attempt to break and enter and larceny night time	*November 27 dismissed.
	January, 4, 193, Boston, Massachusetts, Police, Suspicious Person, Murder.			
lice Department, ston, sachusetts	Anthony Pino #39894	January 4, 193	Suspicious Person Robbery, Armed	
	November 2, 1936, Boston, Massachusetts, Police, as Anthony Pino, #39894, State Penitentiary, Larceny			
lice Department, erville, sachusetts	Anthony Pino #--	November 2, 1936	Suspicion of larceny	Released on waiver.
te Penitentiary, rlestown, sachusetts	Anthony Pino #20573	January 3, 1938	Breaking, Entering, intent to commit felony (day) having in possession burglar implements	3-4 years 3-4 years from and after September 1 1944, released

Ex. 4

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

Exhibit #4(a)

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UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

1-4

J. Edgar Hoover
Director.

The following FBI record, NUMBER 169 123, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
lien Registration ivision, United tates Immigration d Naturalization rvice, iladelphia, nnsylvania.	Anthony Pino. #2136979	Alien Registration March 28, 1941		
ited States migration and turalization rvice, Boston ssachusetts	Anthony Pino #538/482-A-2136979	December 6, 1941	Violation of Immigration Laws	Pending Deportation.
lice Department, rlington, ssachusetts	Anthony Pino #1495	not given (print received December 20, 1948	larceny (less than $100.00)	
lice Department, ltham. ssachusetts	Anthony Pino #--	December 23. 1948	receiving stolen property	not guilty
United States Immigration and Naturalization Service (duplicate print	Anthony Pino #E-1356 Boston Massachusetts returned-enclosure)	January 10. 1953	violation Immigration Laws	pending

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

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UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

J. Edgar Hoover
Director.

The following FBI record, NUMBER 169 123, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

Suffolk School, Breaking and entering.(as on print #250
October 23, 1915, South Boston, Massachusetts, stealing ride car; on file.
September, 30, 1916, South Boston, Massachusetts, stealing ride car; on file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and larceny, (2); file.
October 14, 1916, South Boston, Massachusetts, Breaking and entering and Larceny, probation January 13, 1917, filed.
January 1, 1918, South Boston, Massachusetts, playing ball in street; on file.
June 1, 1918, South Boston, Massachusetts, playing ball in street, filed.
August 15, 1918, Roxbury, Massachusetts, Larceny; probation August 14, 1919.
August 17, 1918, South Boston, Massachusetts, stealing ride, probation.
October 25, 1918, South Boston, Massachusetts, larceny, Suffolk School.
November 25, 1921, Roxbury, Massachusetts, larceny, December 1, Lyman School, suspended sentence.
August 12, 1922, South Boston, Massachusetts, breaking and entering; probation November 11, 1922; November 20th filed.
March 31, 1923, South Boston, Massachusetts, obstructio traffic; on file.
May 20, 1925, Boston, Massachusetts, use without auto; 6 months House of Correction, suspended May 21, 1926.
May 28, 1926, Dorchester, Massachusetts, no license; June 7th, filed.
July 15, 1926, West Roxbury, Massachusetts, N.S.D.; $15. sentence suspended, July 29, 1926.
April 15, 1927, Roxbury, Massachusetts, speeding, $10.00 paid.
August 4, 1927, Boston, Massachusetts, restricted street; $5.00 paid.
November 25, 1927, Boston, Massachusetts, abuse of femal child; December Grand Jury.
December 21, 1927, Roxbury, Massachusetts, speeding, $15.00 committed.
September 3, 1932, Dorchester, Massachusetts, M.D.C., filed

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

COPY BOUND C

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

1-4

J. Edgar Hoover
Director.

The following FBI record, NUMBER 169 123, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

January 13, 1933, Boston, Massachusetts, as Anthony
Pino, #30994, suspicious person, breaking windows.
January 16, 1933, Central, Boston, Massachusetts,
Breaking and entering daytime, 2 years House of
Correction, appealed (December 4, 1933 not guilty)
January 16, 1933, Central Court, Boston, Massachusetts,
Accessory before the fact and breaking and entering,
probable cause.

night.
June 3, 1933, Boston, Massachusetts, Police,
as Anthony Pino, #30994, Suspicious Person, Breaking
and entering, night.
June 21, 1933, East Boston, Massachusetts, Police
not slowing down, $5.00 paid.
May 4, 1934, Boston, Massachusetts, Police, as
Anthony Pino, #30994, Suspicious Person, robbery
armed.
June 18, 1934, Taunton, Massachusetts, Speeding,
$5.00, paid.
January 28, 1935, Boston, Massachusetts, Police, as
Anthony Pino, #0994, Suspicious Person, Robbery
armed, released.
February 13, 1935, Boston, Massachusetts, Police,
as Anthony Pino, #30994, Suspicious Person,
breaking and entering.
March 9, 1935, Boston, Massachusetts, Police, as
Anthony Pino, #30994 Suspicious Person, breaking
and entering, store: released.
March 11, 1935, Boston, Massachusetts, Police, as
Anthony Pino #30994, Suspicious Person, safe job,
released.
January 16, 1936, Boston, Massachusetts, Police, as
Anthony Pino, #39894, Suspicious Person, robbery
armed.
February 13, 1936, Boston, Massachusetts, Police, as
Anthony Pino, #BR-2587 Suspicious Person, robbery
armed.
October 9, 1936, Boston, Massachusetts, Police, as
Anthony Pino, #39894 Suspicious Person, armed
robbery.

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

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A-54

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON 25, D. C.

J. Edgar Hoover
Director.

The following FBI record, NUMBER 169 123, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION

As Anthony Pino, #1495, Police Department, Arlington,
Massachusetts, December 5, 1948, larceny (less than
$100.00); on December 8, 1948 case was continued to
December 23, 1948.

As Anthony Pino, #1495, Police Department, Arlington,
Massachusetts, December 5, 1948 larceny (over $100.00
from persons unknown); on December 8, 1948 continued t
December 23, 1948.

Anthony Pino #1586-1928 Suff Superior Court Boston
March 29, 1928 intent rape and rape; found guilty 5 ye
1 day Massachusetts Reformatory

Anthony Pino #8649-1948 Cambridge Massachusetts 3rd
District Court December 8, 1948 larceny; 1 year House
of Correction approximately January 28, 1949 suspended
sentence January 30, 1950 filed.

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on dat
furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS
INVESTIGATIVE LEADS.

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A-55

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Record from 945 INS Address 73 Tremont St., Boston, Mass.

(On the above line please state whether Police Department, Sheriff's Office, or County Jail)

(PLEASE PASTE PHOTO HERE)

Your no. 169 123 for criminal record

Date of arrest 1-10-53

Charge Violation immig. laws

Disposition of case pending

~~633 Quincy Shore Blvd Wollaston Mass~~

Residence 3 Fuller St., Dorchester

Place of birth Sicily, Italy

Nationality Italian

Criminal specialty see note

F. B. I. NO. 169 123 ✓

Age 46 Date of birth 5/10/06

Height 5'7" Comp. med. Hair black

Weight Eyes brown Build

Scars and marks tattoo of eagle with word "Liberty" on right forearm and ~~on left forearm tattoo of hand with~~ dagger.

CRIMINAL HISTORY

NAME	NUMBER	CITY OR INSTITUTION	DATE	CHARGE	DISPOSITION OR SENTENCE
ANTHONY PINO	1586-1928	Suff Sup Court Boston	3-29-28	Int Rape & Rape(Viol	Found Guilty Willis) 5yrs 1 day Mass Reformatory
" "	8649-1948	Cambridge Mass 3rd Dist Court	12-8-48	Larceny	1 Yr HC app; 1-28-49 Susp Sent 1/30/50 Filed.

ACCOMPLICES

NAME	NUMBER	NAME	NUMBER	NAME	NUMBER

(Please furnish all additional criminal history and police record on separate sheet)

RECORDED
JAN 13 1953

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[RECORD OF THIRD DISTRICT COURT OF EASTERN MIDDLESEX.]

Commonwealth of Massachusetts.

MIDDLESEX, TO WIT:

To the Third District Court of Eastern Middlesex, holden at Cambridge for the Transaction of Criminal Business, within the County of Middlesex,

William M. Germain

of ~~Cambridge~~ Arlington in said County, in behalf of the Commonwealth of Massachusetts, on the eighth day of December in the year of our Lord one thousand nine hundred and forty-eight on oath complains that Anthony Pino

did steal twelve golf balls

of the value of less than one hundred dollars of the property of

R. W. Shattuck Co. Inc.

William M. Germain

MIDDLESEX, SS. Received and sworn to, on said day, before said Court.

James W. Culhane *Assistant Clerk.*
Pro tem

Form GF. 21 11-52-500

X. 5

A True Copy of Complaint
Attest: James W. Culhane
Assistant Clerk

EXHIBIT #5.

MIDDLESEX, ss. CAMBRIDGE, December 8, 1948 ...

By virtue of the Statute, the within named defendant was arrested by me without a warrant.

William M. Germain
Police Officer of ~~Cambridge~~ Arlington

ARLINGTON

1948 No. 8649

COMMONWEALTH

vs.

Anthony Pino

LARCENY

G. L., Ch. 266, Sect. 30

Bailed $1000 Real Estate
S. December 8, 1948
W.

Plea, -Not Guilty
December 23,1948
Judgment-Guilty
1 year House of Correction
Appeal December 27, 1948 $1000
recognized Bailed Surety Company
Bond
December 28, 1948 Appeal withdrawn
by leave of Court
December 28, 1948 Motion for new
trial filed and allowed Continued
for retrial-Finding revoked
January 4, 1949
Judgment-Guilty
1 year House of Correction
Appeal January 10, 1949 $50
recognized cash January 4, 1949

January 28, 1949 Appeal withdrawn
by leave of Court and original sentence
1 year House of Correction suspended
January 30, 1950 appeal waived
Sentence revoked on file.

A True Copy of Complaint
Att. James D. Cullen
Assistant Clerk

[RECORD OF SUPERIOR COURT FOR SUFFOLK COUNTY.]

No. 1586 of 1928

COMMONWEALTH OF MASSACHUSETTS

Suffolk, to wit:

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of March in the year of our Lord one thousand nine hundred and twenty-eight.

The Honorable Harold P. Williams, a Justice of said Court presiding

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of January in the year of our Lord one thousand nine hundred and twenty-eight.

The Jurors for the Commonwealth of Massachusetts, on their oath present that

ANTHONY PINO, BERNICE SAXTON and **MARY GRIGAS**

on the seventeenth day of November in the year of our Lord one thousand nine hundred and twenty-seven in and upon one Viola Willis a female child under the age of sixteen years, did make an assault, with the intent her, the said Viola Willis unlawfully and carnally to know and abuse; and her the said Viola Willis then and there did unlawfully and carnally know and abuse.

A true bill.

JOSEPH A. FLYNN

Foreman of the Grand Jury.

FREDERICK T. DOYLE

Assistant District Attorney.

January 9, 1928. Returned into said Superior Court by the Grand Jurors, and ordered to be filed.

Attest:

JOHN P. MANNING
Clerk.

Record

January 9, 1928. Indictment was found and returned into said Superior Court by the Grand Jurors.

January 16, 1928. Pino pleaded not guilty to said indictment. Thereupon said Pino was set at the bar for trial. A jury was impanelled and sworn to try the issue.

January 17, 1928. After part of the testimony was introduced, said Pino was called in said Court and was defaulted. Thereupon said issue was withdrawn from said jury.

March 15, 1928. Said Pino was again tried by a petit jury.

March 20, 1928. Said jury returned a verdict that said Pino was guilty of said indictment.

March 29, 1928. It was considered by said Court that said Pino, for his crime as set forth in said indictment, be committed to the Massachusetts Reformatory at Concord, in said Commonwealth, there to be kept and governed according to the rules of the same for the term of five years and one day and that he stand committed until he be removed in pursuance of said sentence.

I hereby certify that the foregoing is a true copy of the record of said Superior Court in said case.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Superior Court, at Boston aforesaid, this sixth day of January, in the year of our Lord one thousand nine hundred and fifty-three.

William M. Prendible
[Seal] Clerk.

[DECISION AND ORDER OF OCTOBER 26, 1950, RE DEPORTATION OF ANTHONY PINO.]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Oct 26 1950
(No Appeal)

File: A-2136979—Boston (538-482)

In re: ANTHONY PINO OR FRANK GURNO

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Manuel Katz, Esquire
209 Washington Street
Boston, Massachusetts

CHARGES:

Warrant: Act of 1917—Sentenced more than once subsequent to entry for crimes, to wit: Breaking and entering with intent to commit a felony; and Abuse of a female child.

Lodged: Act of 1917—Sentenced more than once for conviction in this country of crimes after entry, to wit: Abuse of a female child; and possession of burglarious implements with intent to employ and use in order to steal money or other property.

APPLICATION: Cancellation of warrant of arrest

DETENTION STATUS: Released under bond

DISCUSSION: The record relates to a 43-year-old married male, native and citizen of Italy, whose last and only entry into the United States was at the port of Boston, Massachusetts on May 25, 1908. A warrant of arrest was issued on April 20, 1938 under the provisions of the Immigration Act of 1917, in that he had been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission subsequent to entry of a crime involving moral turpitude, to wit: Breaking and entering with intent to commit a felony; and abuse of a female child.

The respondent was indicted for the abuse of a female child at Boston, Massachusetts on January 9, 1928, and was convicted on March 20, 1928 and sentenced to the Massachusetts Reformatory at Concord, Massachusetts for a term of five years and one day. The respondent was indicted with others for breaking and entering a building with intent to commit a felony therein, at Boston, Massachusetts on December 7, 1937. He pled guilty to the indictment on January 6, 1938 and was sentenced to a term of not more than four and not less than three years at State Prison, Boston, Massachusetts. The respondent was also indicted with others in Boston, Massachusetts on December 7, 1937 for having in his possession certain burglary tools. He pleaded guilty to said indictment and was sentenced in the Superior Court, for Suffolk County at Boston, Massachusetts on January 6, 1938 for a term of not more than four and not less than three years, this sentence to take effect after the expiration of his sentence for breaking and entering.

On January 5, 1949, the hearing was reopened in order that an additional criminal charge could be lodged in that under the Immigration Act of February 5, 1917 he was subject to deportation in that he had been sentenced to imprisonment for a term of one year or more because of conviction in this country of crimes involving moral turpitude committed after entry, to wit: Abuse of a female child; and possession of burglarious implements with intent to use and employ in order to steal money and other property. This conviction was made a part of the record as shown by Exhibit 6. There was also entered into the hearing as Exhibit 12 a certified copy of court record showing that respondent was convicted on December 23, 1948 for the crime of larceny and sentenced to one year in the House of Correction. The court record further shows that on withdrawal of his appeal, the original sentence of one year in the House of Correction was suspended. Although respondent was sentenced to imprisonment for a term of one year or more on his larceny conviction, the sentence was suspended. It has been held that a completely suspended sentence is not a sentence under the immigration laws where imprisonment as a result of such conviction does not follow. *U. S. ex rel. Robinson v. Day,* (C.C.A. NY. 1931), 51 F. 2d. 1022.).

There has also been entered into the record as Exhibit 9 Certified Copy of Pardon furnished under date of September 21, 1949 by the Chairman of the Advisory Board of Pardons for Massachusetts, showing that on September 6, 1949 the respondent was fully and completely pardoned for the crimes of (1) Breaking and entering in the day time to commit a felony; (2) having burglarious tools for which he was convicted in the Suffolk County Superior Court at Boston, Massachusetts during January 1938 and sentenced to three and four years and three and four years from and after. In view of this pardon the charge in the warrant of arrest as well as the lodged charge are not sustained.

The warrant of arrest will be canceled.

ORDER: It is ordered that the warrant of arrest dated April 20, 1938, be canceled, and the proceedings terminated.

A. C DEVANEY
Assistant Commissioner
Adjudications Division

[DECISION AND ORDER OF SPECIAL INQUIRY OFFICER DATED MARCH 23, 1953.]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Boston 8, Massachusetts

File: E-1356 Boston March 23, 1953

In re: ANTHONY PINO

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Paul T. Smith, Attorney of record, Manuel Katz, Associate counsel, 209 Washington Street, Boston, Mass.

CHARGES:

Warrant: Immigration and Nationality Act—Convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Assault with intent to rape and rape; and larceny.

Lodged: Immigration and Nationality Act—Convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Abuse of a female child; and larceny.

APPLICATION: None

DETENTION STATUS: Released on bond

WARRANT OF ARREST SERVED: January 10, 1953

DISCUSSION: This record relates to a 45 year old married male, a native and citizen of Italy, whose only entry into the United States occurred at the port of Boston, Massachusetts, ex SS Romanic, on May 25, 1908, when he was admitted for permanent residence. That entry has been verified.

On January 9, 1928, the respondent was indicted by a Grand Jury of Suffolk County, Boston, Massachusetts charging him with abuse of a female child and, after entering a plea of not guilty, was found guilty as indicted in the Superior Court, Boston, Massachusetts, on March 20, 1928, and sentenced on March 29, 1928, to be committed in the Massachusetts Reformatory, at Concord, Massachusetts for a term of five years and one day. A certified copy of this conviction was presented to the respondent and he identified it as relating to him (Exhibit #6).

The respondent was convicted of the crime of larceny of a dozen golf balls, in the District Court of Cambridge, Massachusetts, on January 4, 1949, and sentenced to one year in the House of Correction. Sentence was suspended. On January 30, 1950, the court revoked the sentence and the case was placed on file. A certified copy of the court record in this matter was identified by the respondent as relating to him (Exhibit #5). The last-mentioned court record (Exhibit #5) shows that the respondent was tried under Section 30 of Chapter 266 of the General Laws of Massachusetts, which reads:

> "Whoever steals, or with intent to defraud, obtains by a false pretense, or whoever unlawfully and, with intent to steal or embezzle, converts or secretes, with intent to convert, the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars, be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; or, if the property was stolen from the convey-

> ance of a common carrier or of a person carrying on an express business, shall be punished for the first offense by imprisonment for not less than six months nor more than two and a half years, or both, or by a fine of not less than fifty dollars nor more than six hundred dollars, or both, and for a subsequent offence by imprisonment for not less than eighteen months nor more than two and a half years, or by a fine of not less than one hundred and fifty nor more than six hundred dollars or both."

Under this section of law, the value of the property is material only for the purpose of fixing the punishment. Larceny has always been held to involve moral turpitude. U. S. ex rel Rizzio v. Kenney (D.C. Conn. 1931) 50 F. (2d) 418; 2, I. & N. 201, *Matter of N—*; 2, I. & N. 530, *Matter of M—*.

It is contended that because of revocation of sentence and of the subsequent filing of the case, there was no conviction in this matter of larceny. It is argued that the case is not at rest, in that, it may again be brought before the appropriate court and the respondent sentenced anew. Thereafter, the respondent would have his usual right of appeal. This view is untenable. On the question as to whether conviction as used in the statute means a legal determination of the guilt of the accused by his own plea or final judgment pronounced against him, Bouvier says that the former undoubtedly represents the accurate meaning of the term, and includes an ascertainment of a party's guilt by verdict of a jury as well as by his own confession. He adds, "It is said to be sometimes used to denote final judgment." Blackstone uses the word exclusively in the former sense. "Conviction" may accrue in two ways, either by his confessing the offense and pleading guilty or by his being found so by the verdict of his country.

The Massachusetts courts have held that the filing of a case, after a finding of guilt, constitutes a conviction: 179-108 Mass., Munkley v. Commonwealth; Commonwealth v. Lockwood—109 Mass. 323. In this latter case, there is found a definition of conviction, judgment and sentence in the following comment: "The ordinary legal meaning of 'conviction' when used to designate the particular stage of a criminal prosecution tried by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury which ascertains and publishes the fact of his guilt—while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequence to the convict of fact thus ascertained." The same interpretation follows in a trial without jury, that a court must make the finding as to whether the person charged is or is not guilty. The United States District Court, at Boston, in an unreported decision in the matter of Salvatore De Matreo, a petitioner for naturalization, held that a finding of guilt by a jury of conspiring wilfully and maliciously to burn a building, after which the indictment was filed by the court, was a conviction. The United States District Court, at Providence, Rhode Island, in an unreported decision in the matter of Joseph Packowitz alias Joseph Peck, a petitioner for naturalization, held that a finding of guilt on a charge of lewd and lascivious cohabitation, after which the case was filed, was a conviction.

In reference to the respondent's conviction for abuse of a female child, on March 29, 1928, the indictment which is part of Exhibit #6 charges that the respondent on, ". . . a female child under the age of sixteen, did make an assault, with intent unlawfully and carnally to know and abuse; and her the said . . . then and there did unlawfully and carnally know and abuse.", on November 17, 1927. It has been held that carnal abuse of a minor child is a crime involving moral turpitude. 2, I. & N. 121 (footnote: *Matter of D—*, A-2174218 decided 3-25-44); also, 2, I. & N. 610, *Matter of F—*, decided June 7, 1946, wherein it is held that contributing to the delinquency of a child by encouraging her to be guilty of indecent and lascivious conduct, such acts being of the nature commonly called statutory rape, involves moral turpitude.

The convictions, which form the basis for this proceeding and the acts connected therewith, occurred approximately twenty years apart and therefore it is established that they did not arise out of a single scheme of criminal misconduct. The charge lodged at the hearing is sustained.

It is contended by the respondent that the Immigration and Nationality Act is an ex post facto law and that it is therefore unconstitutional. The Special Inquiry Officer may not decide on that question for the reason that such a function of passing on the constitutionality of a statute enacted by Congress flows to the judicial branch of the Government. Panitz v. District of Columbia, 112 F. (2d) 39, 42 (C.A.,D.C.,1940); Todd v. Securities and Exchange Commission, 137 F. (2d) 475, 478 (C.A. 6, 1943). However, constitutionality of previous immigration laws, which were retrospective in their application, have been tested and held not to be unconstitutional. Harisiades v. Shaughnessy, 342 U.S. 580; Carlson et al v. Landon, 342 U.S. 524. That it was the deliberate intent of Congress to make the present Act retrospective in its application is established by Section 241(d) of the Act, which reads: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

Respondent formally requested that the Special Inquiry Officer subpoena the Chief, Investigations Section and the Acting District Director requiring them to produce their records, in order that their authority might be questioned to apply for and issue the warrant of arrest on the particular charges contained therein. The request was denied. At hearing, the respondent specifically denied having been convicted of the crime of: Assault with intent to rape and rape; a crime with which he was charged with being convicted in the warrant of arrest. However, there was lodged at hearing, in accordance with the authority contained in Section 242.53 (d), Title 8 CFR, an additional or other charge, that he is subject to deportation under the provisions of the Immigration and Nationality Act, in that, he has been convicted after entry of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny; which is supported by the evidence of record; and consequently, the presence of the officers was unnecessary. The possible irregularity in the warrant of arrest is overcome where the alien is notified of the new charge against him and is given full opportunity to be heard thereon, even though a new warrant of arrest is not issued. U.S. ex Boric v. Marshall, D.C. Pa. 1933, 4 F. Supp. 965, appeal dismissed, C.C.A. 1933, 67 F. 2d 1020, certiorari granted, 1933, 54 S. Ct. 345, 290 U.S. 623, 78 L. Ed. 543, certiorari dismissed, 1935, 54 S. Ct. 371, 290 U.S. 709, 78 L. Ed. 609. Furthermore, even if present, a deficiency in the warrant of arrest will not alone nullify the entire proceedings where sufficient affirmative evidence has been presented to sustain a deportation charge. Toku Sakai v. U.S., 239 Fed. 492 (C.C.A. 9, 1917); Int. Dec. No. 330, decided by the Board of Immigration Appeals June 22, 1951.

Counsel on several occasions requested that the file before the Special Inquiry Officer be made available to him. This was denied. The transcript of hearings, and the exhibits made a part of the record, constitute the only evidence considered by the Special Inquiry Officer in this case and copies of this material are available to counsel.

It has been charged, during the course of the hearing, that the Special Inquiry Officer has acted arbitrarily, unreasonably, and wholly inconsistent with the philosophy of a fair hearing and with the legal and constitutional requirements of due process. A review of the record shows that the respondent was advised of the charge in the warrant of arrest, was represented by counsel, was questioned as to alienage and to facts of entry, which he readily admitted against interest. He was presented with certified copies of convictions covering two separate and distinct crimes, which he readily admitted as relating to him. There was lodged against him at hearing an additional charge, as provided by regulations, and the evidence in support thereof was made known to him. Thereafter, in conformity with regulation, he was granted adjournment to prepare a defense on the new charge. The record shows that hearing was initiated January 28, 1953 and adjourned to February 10, 1953, after the lodging of a charge at hearing, to afford counsel time to prepare a defense. Consecutive sessions of the hearing were held February 10, 1953 and February 16, 1953 and were each adjourned on motion of counsel. A last adjournment was granted on February 16, 1953 by the Special Inquiry Officer, on motion of counsel, to February 27, 1953. After that, administratively, a postponement was granted to March 6, 1953 because of a change in counsel. The hearing was concluded on March 6, 1953.

The record shows that the respondent on a previous occasion had been under deportation proceedings which had been terminated as a result of a full and complete pardon issued by the Governor of the Commonwealth of Massachusetts, on September 6, 1949, for the crimes of: Breaking and entering in the daytime, to commit a felony; and having burglarious tools; for which he had been convicted in Superior Court, Boston, Massachusetts, in January 1938. The respondent claims that the crimes, of which he is charged in this proceeding, were considered in the previous hearing. As the respondent stated he was unable to specify the charges against him, either in the warrant of arrest relating to the previous hearing or any lodged charge therein, there was made a part of this record the final order terminating the previous proceeding. The record now before me shows that in previous hearings in deportation proceedings, the respondent was charged with being deportable under the Act of 1917 because he was sentenced more than once subsequent to entry for crimes, to wit: Breaking and entering, with intent to commit a felony; and abuse of a female child; on the basis of a warrant of arrest dated April 20, 1938. There were various hearings granted in that proceeding from 1941 to 1949 during which there was lodged the charge, under the Immigration Act of 1917, that he was sentenced more than once for conviction in this country of crimes after entry, to wit: Abuse of a female child; and possession of burglarious implements with intent to employ and use in order to steal money or other property. Of the crimes which supported the charges in the previous proceeding, only one, namely: Abuse of a female child; is in issue before us in this proceeding. The others were wiped out by the executive pardon previously mentioned.

As a matter of fact, under the Immigration Act of 1917, the respondent was not deportable for his conviction for larceny in 1949 for the reason that the sentence of one year was totally suspended at that time. The present Immigration and Nationality Act now reaches the respondent on a crime for which he was heretofore not deportable. Thus, under Section 241(a)(4) of the present Act, it is not material that a twice-convicted alien be sentenced to imprisonment to fall within its scope, as it plainly states that he shall be deportable for conviction of two crimes after entry, ". . . regardless of whether confined therefor . . .".

Under examination by counsel, the respondent stated that he might have been born in the United States. Under redirect examination by Special Inquiry Officer, the respondent testified that he had never said he was born, but that he may have been born here. Thereafter, he stated that to the best of his knowledge, he was born in the United States. Originally and initially in this hearing, the respondent had freely and against interest admitted he is a native and citizen of Italy and had come to the United States in 1908, accompanied by his mother. He identified his record of entry as an alien. His alienage is therefore established. His testimony that he may have been or was probably born in the United States comes somewhat belatedly, is self-serving, and not at all convincing. No credence to this late claim of United States citizenship is given by the Special Inquiry Officer.

It is the contention of counsel that the Special Inquiry Officer investigated the case, in that, he reviewed it prior to hearing. It is immaterial whether or not this was done. If it was reviewed, it was solely for the purpose of determining the evidence to be developed and the material to be introduced at the hearing and for no other purpose.

The respondent is married to a citizen of the United States, whom he supports, and has no children. He gives as his occupation, dealer in second-hand and new furniture; and operating a parking lot. His father and mother are residents of the United States and he has two sisters and a brother born in this country. Counsel objected to questions relating to the respondent's assets. Further inquiry was not made on that score. Exhibit #5 shows that the larceny, of which the respondent was convicted on January 4, 1949, was committed on December 8, 1948. The respondent cannot establish good moral character for the last five years and consequently cannot establish statutory eligibility for any relief from deportation.

The respondent refused to name a country to which he desired to be sent, in the event he is ordered deported.

FINDINGS OF FACT: Upon the basis of the evidence in the case, it is found:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent's only entry into the United States occurred at the port of Boston, Massachusetts, ex SS Romanic, on May 25, 1908, in the company of his mother, when he was admitted for permanent residence;

(3) That the respondent was convicted in Superior Court, Boston, Massachusetts, on March 20, 1928, after a plea of not guilty, on an indictment charging him with abuse of a female child, and sentenced on March 29, 1928 to a term of five years and one day in the Massachusetts Reformatory;

(4) That the respondent was convicted, as charged, on a complaint of larceny, in District Court, Cambridge, Massachusetts, on January 4, 1949, and sentenced to one year in the House of Correction, sentence suspended; sentence revoked on January 30, 1950 and the case thereupon placed on file.

CONCLUSIONS OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 241(a)(4) of the Immigration and Nationality Act, the respondent is subject to de-

portation on the ground that, he at any time after entry has been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny;

(2) That under Section 241(a)(4) of the Immigration and Nationality Act, the respondent is not subject to deportation on the ground that, he at any time after entry has been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Assault with intent to rape and rape; and larceny.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the lodged charge only.

T J GEOFFRION
T. J. Geoffrion
Special Inquiry Officer

[LETTER DATED JUNE 4, 1953, BY PAUL J. CRONIN, ASSISTANT CLERK, THIRD DISTRICT COURT OF EASTERN MIDDLESEX, TO WILLIAM F. WALL.]

June 4, 1953

William F. Wall
United States Department of Justice
Immigration and Naturalization Service
73 Tremont Street
Boston 8, Massachusetts

Re. Anthony Pino
E-1356 (WU)
Court No. 8649 of 1948

Dear Mr. Wall:

It appears that some question has arisen in reference to my communication to you in reply to your letter asking for clarification of the entries in this court on the above entitled matter.

At the request of Paul T. Smith, Esq. of Boston I am writing this in addition, in an effort to clarify the question of a defendant's right if his case is removed from the files. It appears that since the original sentence is revoked, if a new sentence be imposed the defendant would thereupon have the right of appeal to the Superior Court, from the new sentence, if so imposed. If the original plea entered by the defendant in a case was "not guilty" upon an appeal the matter is thereupon certified to the Superior Court for trial de novo. I enclose herewith copy of communication from Paul T. Smith.

Very truly yours,
PAUL J. CRONIN
Ass't. Clerk
PAUL J. CRONIN

PJC/W
CC to Paul T. Smith
A true copy:

[DECISION OF BOARD OF IMMIGRATION APPEALS DATED AUGUST 11, 1953.]

E-1356—Boston

ANTHONY PINO

IN DEPORTATION PROCEEDINGS

In Behalf of Respondent:

Paul T. Smith, Esq. Manuel Katz, Esq. Reuben Goodman, Esq. 209 Washington Street Boston, Massachusetts (Heard June 5, 1953)	(Sidney B. Rawitz, Esq., Representative of the Immigration & Naturalization Service also heard)

CHARGES:

Warrant: Immigration & Nationality Act—convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Assault with intent to rape and rape; and larceny

Lodged: Immigration and Nationality Act—convicted of two crimes, after entry, not arising out of a single scheme of criminal misconduct: Abuse of female child; and larceny

APPLICATION: Cancellation of warrant of arrest and termination of proceedings

DETENTION STATUS: Released on bond

Warrant of Arrest served January 10, 1953

This is an appeal from a decision of the Special Inquiry Officer dated March 23, 1953, directing the deportation of the respondent on the charge lodged at the hearing.

The case is concerned with a 58-year-old married male alien who was born at Divieto, Messina, Italy on May 7, 1907. He was admitted to the United States on May 25, 1908 for permanent residence. He was then one year old and was accompanied by his mother. He has maintained a residence in the United States since that time.

The record shows that the respondent was arrested on December 8, 1948 and a complaint filed against him in the Third District Court of Eastern Middlesex, Cambridge, Middlesex County, Massachusetts, charging him with stealing 12 golf balls; that he entered a plea of not guilty but was found guilty on December 23, 1948 and sentenced to one year in the House of Correction; appeal was taken on December 27, 1948, but on December 28, 1948 the appeal was withdrawn by leave of court and a motion for a new trial was filed and allowed continued for new trial. On January 4, 1949 he was found guilty, sentenced to one year in the House of Correction and appealed on January 10, 1949; on January 28, 1949 appeal withdrawn by leave of court and sentence suspended; on January 30, 1950 appeal was waived, sentence revoked, and the case placed on file (Ex. 5). The record further shows that on January 9, 1928, respondent was indicted by a Grand Jury of Suffolk County, Boston, Massachusetts, charging him with abuse of a female child and, after entering a plea of not guilty, was found guilty, as indicated, on March 20, 1928, and sentenced on March 29, 1928, to be committed in the Reformatory, Concord, Massachusetts for a term of five years and one day (Ex. 6). The foregoing evidence consists of certified copies of court records which have been identified as relating to the respondent [1].

The first contention of counsel is that Pino is not deportable because he has not been "convicted" of the crime of larceny of 12 golf balls. That is, it is counsel's argument that the action of the court in this case in placing it on file precludes us from finding that there has been a "conviction," within the purview of the immigration laws, because the placing of a case on file does not, under the laws of Massachusetts, constitute a "conviction" [2].

Prescinding momentarily from the immediate issue, however, the Supreme Judicial Court of Massachusetts has repeatedly enunciated the essential character of that feature of the Commonwealth's Criminal Procedure here being considered. It has long been a common practice in that state, after a verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute (Sts. 1865, c. 223, 1869, c. 415, s. 60; cf. also c. 218, s. 38 and c. 219, s. 8—Gen. Laws Massachusetts, Ter. Ed. 1933). Such an order is not equivalent to a final judgment, or to a nolle prosequi or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein (*Commonwealth v. Dowdican's Bail,* 115 Mass. 123). The case then stands on the records of the court, and although usually no further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it (*Marks v. Wentworth,* 199 Mass. 44). There has been merely a suspension of active proceedings in the case, and as yet no final disposition (*Commonwealth v. Carver,* 224 Mass. 42)[8].

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[1] For lengthy criminal record relating to respondent, see Appendix

[2] Counsel has pointed out that this primary problem must be determined by applying the law of the state where the crime was committed (*U. S. v. Smith*, 41 F 2d 707), here, Massachusetts.

The question of the proper interpretation to be given the words "final conviction" or "finally convicted" is not free from difficulty (Fifth Report of Judicial Council of Mass., 1929; 15 MQ (2) 31). It is quite clear to us, however, that the term "conviction" is used in at least two different senses in the Massachusetts Statutes. And it appears to be well settled that in its ordinary legal sense the word "conviction", as used in those statutes, signifies that the defendant has pleaded guilty, or has been found guilty by the verdict of a jury. The exhaustive opinion of Chief Justice Gray (*Commonwealth v. Lockwood,* 109 Mass. 323), leaves no doubt that such was the meaning of the word "conviction," not only in the common law, but as it was used in the Constitution, and, for the most part, in the Statutes of the Commonwealth of Massachusetts (Public Sts., c. 200, s. 5; Gen. Laws, Ter. Ed., c. 263, s. 6—1933). In some statutes, however, the word is used as implying the judgment and sentence of the court upon a verdict or confession of guilt. For example, the provisions of the statutes (Pub. Sts., c. 169, s. 19; Gen. Laws, c. 233, s. 21), that the conviction of a witness of a crime may be shown to affect his credibility, has been held to be limited to cases where final judgment has been entered upon the verdict (*Commonwealth v. Gorham,* 99 Mass. 420)[4]. So also in the case of the plea of autre fois convict (*Commonwealth v. Lockwood,* 109 Mass. 323, 329). These and other cases in which the word "conviction" is used in a more comprehensive sense as implying a judgment may be regarded, however, as exceptions to the general rule (1 Op. Att'y. Gen. 499, 500).

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[8] While the decisions herein cited are not necessary to support our decision, it is of interest to note that the Supreme Judicial Court of Mass. has at least intimated that the "placing of a case on file" may be the same as suspension of sentence (*King v. Commonwealth,* 246 Mass. 57), and probation (*Finer v. Commonwealth,* 250 Mass. 493).

In *Munkley v. Hoyt,* 179 Mass., 108 where it was provided in St. 1896, c. 397, s. 9, that the Board of Registration in Pharmacy, after hearing, might suspend the registration and certificate of a registered pharmacist, or might revoke such registration and certificate altogether, but which contained the provision that "the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction," the court held that the placing of a case on file after a plea of guilty was a sufficient conviction to warrant the suspension or revocation of the license. Whereas, in the case of *Commonwealth v. Kiley,* 150 Mass. 325, where the statute (St. 1887, c. 392) provided that the conviction of a person licensed to sell intoxicating liquors shall of itself make the license void, the court held that a verdict of guilty was not a "conviction" within the meaning of the statute (See also, *Commonwealth v. Gorham,* 99 Mass. 420; *Fay v. Harlan,* 128 Mass. 244).

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[4] In 1950 this section was amended so that, under certain circumstances, a plea or verdict of guilty in a felony case constitutes a conviction within the meaning of the statute (*Forcier v. Hopkins,* 53 A.S. 95, Jan. 8, 1953; 110 F. 2d 126)

The distinction between the cases of *Munkley v. Hoyt* and *Commonwealth v. Kiley* (*supra*), and other similar decisions, appears to rest upon the fact that in the latter the conviction itself voids or revokes the license so that the loss of the license in effect becomes a part of the sentence rather than a consequence of the verdict or finding of guilty, while in the former case the determination of the guilt of the license did no more than confer jurisdiction upon an independent tribunal to proceed with a separate inquiry resulting in the revocation or suspension of the license (3 Op. Att'y. Gen. 572).

Counsel also contend, with regard to the question of "conviction," that Pino's case is still pending in the District Court, can be called up for sentence at any time on motion of either party[5], and that if a new sentence is imposed Pino will have an appeal to the Superior Court where, it is alleged[6], he will be given a trial de novo. The argument is then advanced that if we hold that there has been a "conviction" here, Pino may well be deported and thereafter found not guilty by the Superior Court.

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[5] At page 3 of Supplemental Brief, it is indicated that Pino filed a motion for a new trial on February 4, 1953, and that on February 14, 1953 decision on the motion was reserved.

[6] Letter of June 4, 1953 from Assistant Clerk of District Court, furnished by counsel, supplementing letter of January 29, 1953, to Boston Office of the Service.

For citations of cases paralleling *Munkley v. Hoyt* & *Comm. v. Kiley* decisions see Appendix.

While we do not wish to question the accuracy of the information contained in the letter of the Assistant Clerk of the District Court (*, supra), the contents thereof are not entirely clear to us in the light of the facts of this case and the law of Massachusetts. In the case of *Renado v. Lummus,* 205 Mass. 155, the court held:—"A right of appeal in a criminal case in a police, district or municipal court is given only to one who has been *convicted, and the appeal is only from the sentence,* which corresponds to the judgment of the court in civil actions." (Underscoring supplied) In any event, the contingency forseen by counsel can be forestalled administratively by a request for stay of deportation (8 C.F.R. 243.3(b)).

Summarizing briefly, we have exhaustively examined the cases cited by counsel for the alien and the Service, and we have carefully considered the able arguments presented by them. It is clear to us that in its ordinary legal sense the word "conviction," under the law of Massachusetts, means merely that a defendant in a criminal case has pleaded guilty or has been found guilty by a verdict of a jury or finding of a court. That is precisely the situation we find with regard to Pino. It is the policy of this Board to give to the word "conviction" its ordinary legal interpretation, for purposes of the immigration laws. We have pointed out that the exceptions to the general rule in Massachusetts wherein a sentence is required before there has been a "conviction," occur where an additional penalty flows automatically from the imposition of sentence and in effect becomes a part thereof, rather than a consequence flowing therefrom. Here, the determination of Pino's guilt of the crime of stealing golf-balls, plus the crime hereinafter to be discussed, did no more than confer jurisdiction upon an independent tribunal, the Special Inquiry Officer, to proceed with a separate inquiry resulting in the order of deportation, here being appealed. Finally, we have pointed out that even if Pino is successful in obtaining a trial de novo in the Superior Court, whereby the finding of guilt by the District Court might be set aside, he has available an administrative remedy to defer deportation pending such a decision.

On the basis of the foregoing, and as this record now stands, it is clear to us that Pino has been "convicted" of the larceny of twelve golf balls, within the purview of the Immigration and Nationality Act.

It is so well recognized as to obviate further discussion that the crime of larceny, whether grand or petty, involves moral turpitude. B.I.A. (56158) 494, July 5, 1944; *Tillinghast v. Edmund,* 31 F 2d 81; *Blumen v. Haff,* 78 F 2d 833. However, the second substantive argument advanced in this case is that the crime of abuse of a female child, of which Pino was convicted in 1928 (Par. 3, Exh. 6, supra), does not involve moral turpitude.

The crime conviction we are now considering was had under an indictment charging that Pino assaulting a female child under the age of 16 years, with the intent to unlawfully and carnally know and abuse her, and that he did unlawfully and carnally know and abuse her, and that Pino was found guilty as indicted, and there is no question but that his conviction was for violation of Section 23 of Chapter 265 of the General Laws of Massachusetts[7]. It is urged that under said Section a person may be convicted even though he did not know the girl was under age; that the crime requires no force, knowledge, or intent; that the crime Pino committed was merely fornication; that mere fornication even with a girl under sixteen does not involve moral turpitude; and that it is difficult to realize how fornication with a girl of 15 years, 11-1/2 months, of mature body and mind, who voluntarily and perhaps for profit submits, can be considered as base, vile and depraved. Finally, in this connection, it is urged that under Massachusetts Law the crime of abuse of a female child does not necessarily involve moral turpitude.

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[7] Section 23, Chapter 265, Gen. Laws of Mass. reads as follows:— "Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment in the State prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the Commonwealth."

The contention of counsel with respect to this crime are completely without merit. In the first place, this Board has previously held that carnal abuse of a minor child involves moral turpitude (*Matter of P—,* 2I&N Dec. 117, 121—Footnote 16; *Matter of R—*, 3 I&N Dec. 562, 564). Secondly, it has been judicially determined that the crime involves moral turpitude (*Bendel v. Nagle,* 17 F 2d 719; *Ng Sin Wing v. United States,* 46 F 2d 755, 756). In the first decision cited, the court, in passing on a Maryland Statute on the subject, stated:—"The crime of which the appellant was convicted is usually classed as rape, the statute simply raising the common-law age of consent, and such a crime manifestly involves moral turpitude." In the other case cited, the court merely adopted the former, without comment. Finally, in this connection, there is no question but that the crime involves moral turpitude, under the law of Massachusetts. In the case of *Commonwealth v. Hackett,* 170 Mass. 194, the court left no doubt that the crime of having carnal connection with a girl under 16 years is rape, even if she gives full consent (Cf. also, *Commonwealth v. Sugland,* 4 Gray 7). Again, in the case of *Commonwealth v. Murphy,* 165 Mass. 66, the court stated that consent is no excuse (Cf. also, *Commonwealth v. Roosnell,* 143 Mass. 32), and classified this crime "as one of the most heinous crimes that can be committed." The court also therein pointed out that it would make no difference if the female child were 15 years and 11 months of age and answered the argument re: fornication, adversely to counsel, by this language:—"It is a familiar rule that, if one intentionally commits a crime, he is responsible for the consequences of his act if the offense proves to be different from that which he intended."

It is next contended that Pino is not deportable under Section 241(a)(4) of the Immigration and Nationality Act [8] on the basis of his convictions of the two crimes specified in the charge lodged at the hearing, because said Section requires that the alien be sentenced for such crimes. We need not consider the question of whether the placing of a case on file after a verdict of guilty amounts to a sentence, because this contention is obviously without merit. It is clear that the argument is directed to the second clause of Subsection 4 of Section 241(a) of said Act. It is equally clear that that portion thereof does not require sentencing to render Pino deportable. The language of the law is clear and unambiguous, and it is readily apparent that it lucidly expresses the intent of Congress. The legislative history of this Act leaves no room for doubt in the matter and renders it obvious that an alien twice convicted of crimes involving moral turpitude after entry is deportable regardless of whether or not he has been sentenced therefor. The language used to express the Congressional intent is as follows:—

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[8] That Section reads as follows:—"Section 241,(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

> "Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude, is deportable, regardless of whether confined therefor, whereas under existing law the alien must have been sentenced to a term of a year or more because of such convictions" (House Report 1137, 82nd Cong., 2nd Session, p. 21: Report of the Committee on the Judiciary pursuant to Senate Resolution 137, Senate Report 1515, 81st Cong., 2nd Session, p. 392).

Counsel further urges the proposition that Section 241(a)(4) of the Immigration and Nationality Act (*, supra) applies specifically to crimes committed and convictions obtained after the effective date of the Act. That is, it is contended that the language thereof discloses an unmistakable intent on the part of Congress to have that clause applied prospectively only. We, however, reject this argument categorically. Section 19(a) of the Immigration Act of February 5, 1917, as amended, referring to the deportability of aliens on the basis of more than one conviction of a crime involving moral turpitude, stated, "or who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." (underscoring supplied) Section 38 of that Act provided that the provisions thereof were to take effect on or after May 1, 1917. Section 241(a)(4) does not contain the equivalent prospective language which was contained in Sections 19 and 38 of the Act of February 5, 1917, as amended. The foregoing, to us at least, reflects a material change in the law which substitution, since Congress is presumed to have been aware of the construction of terms in the 1917 Act, clearly indicates that the former phraseology did not correspond with the legislative intent and that a different interpretation should be given to the new wording.

Also, the word "hereafter" appears in Section 241(a)(3) of the Immigration and Nationality Act. Had Congress intended to give Section 241(a)(4) thereof prospective application only, it would have been a simple matter to have inserted the same word therein. Moreover, Section 241(d)[9] brings Pino within the class of aliens deportable under 241(a)(4). Section 241(d) expresses unmistakably the intent of Congress to make 241(a)(4) retroactive. There is nothing therein to show only a prospective intent on the part of Congress with regard thereto.

It is further contended that, should we rule, as in fact we have, that the provisions of Section 241(a)(4) of the Immigration and Nationality Act were intended to operate retrospectively, there are ample constitutional reasons to prevent the fulfillment of such intent. That is, it is urged that the Act is constitutionally objectionable because it makes deportable for the first time and without any forewarning aliens such as Pino who before the passage of the Act could not have been deported. In other words, the argument is that the Act is unconstitutional as an ex post facto law. In the first place, during all the years since 1917 Congress has maintained an admonition to aliens that their conviction of more than one crime involving moral turpitude may subject them to deportation at any time. Hence,

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[9] Section 241(d) reads thusly:—"Except as otherwise specifically provided in this Section, the provisions of this Section shall be applicable to all aliens belonging to any of the classes enumerated in Subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of the enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in Subsection (a), occurred prior to the date of the enactment of this Act."

Pino was not caught unawares and there appears to be no ground to the contention that he was not adequately forewarned both that his conduct was prohibited and of its possible consequences. Secondly, the ex post factor clause of the Constitution applies only to criminal proceedings (*Calder v. Bull,* 3 U. S. 386, 390; *Johannessen v. U. S.* 225 U. S. 227, 242), and deportation is not a criminal proceeding (*Bugajewitz v. Adams,* 228 U. S. 585, 591; *Carlson v. Landon,* 342 U. S. 524, 537). The precise contention here made has been unqualifiedly rejected (*Mahler v. Eby,* 264 U. S. 32; *Harisiades v. Shaughnesey,* 342 U. S. 580, is to the same effect).

Exception has also been taken to Pino's deportability on the "unconstitutional for vagueness" argument, in connection with the crimes specified in the lodged charge. It appears to us that argument in this respect has been foreclosed (*Jordan* v. *De George,* 341 U. S. 223), as well as by the cases hereinbefore cited by us (pp. 5 & 6, supra). Hence, further discussion of this point is unnecessary.

Another argument advanced is that the warrant of arrest should be cancelled and this proceeding terminated, for the reason that the doctrine of res judicata is here applicable. This contention is based on the fact that the Assistant Commissioner, Adjudications Division, Immigration and Naturalization Service, in a decision dated October 26, 1950 (Ex. 11), ordered cancellation of the warrant of arrest dated April 20, 1938 and termination of the proceedings. It is alleged that examination of that decision demonstrates that both of the crimes which are the basis for the present proceeding were therein considered; that, as a result, Pino had the status of an alien who could not be deported on account of those two crimes; and that, by virtue of Section 405(a) of the Immigration and Nationality Act, such status continues in force and effect. In the first place, in the prior proceedings deportability was urged on only one criminal ground common to the present basis for deportation, viz—abuse of a female child. Secondly, the decision of the Assistant Commissioner was based on the fact that the effect of the other crime there involved was wiped out by a pardon. Hence, the facts do not support the present contention. Third, it is well established that administrative decisions of the Executive Department of this Government cannot constitute res judicata (*Pearson v. Williams,* 202 U. S. 281). Finally, in this connection, counsel has not cited any specific language in Section 405 (a) on which reliance has been placed. Our examination of that section does not disclose any specific provision thereof particularly applicable to Pino's case, and we believe that Section 241(d) ([9], supra), constitutes a mandate from Congress necessitating the institution of deportation proceedings de novo against Pino, using as one of the elements of the charge a crime which served as one of the elements on which a prior deportation proceeding was based.

We are next called upon to consider certain alleged procedural deficiencies which, according to counsel, constitute ample reasons for cancellation of the outstanding warrant of arrest and termination of this proceeding. By way of outline, they are as follows:—

(1) There were a number of irregularities in connection with the issuance of the warrant of arrest;

(2) There was a denial of opportunity to prepare, in contravention of the basic concepts of fair play guaranteed by the Constitution and intended by the Act and Regulations;

(3) There was a commingling of investigative, prosecutive and judicial functions to an extent prohibited by the Act and falling far short of constitutional standards of impartiality;

(4) There was a denial of opportunity to explain or rebut hearsay evidence in violation of the Regulations and constitutional due process;

(5) There was a denial of opportunity to argue, in violation of the Act, Regulations and the Constitution.

The first irregularity charged in connection with the issuance of the warrant of arrest is that the application therefor specified that Pino had been convicted of two crimes involving moral turpitude, to wit: Assault with intent to rape and rape, and larceny. It is argued that Pino had never been convicted of "assault with intent to rape and rape;" that there was nothing in the Service files indicating the possibility of such a conviction. Therefore, the Service Officer applying for the warrant of arrest could not have determined that a prima facie case for deportation had been established on which to base the application; and that, by the same token, the Service Official had no authority to issue the warrant. However, the record shows that the application was supported by certified copies of the court records showing Pino's conviction of carnal abuse of a female child and larceny. We have previously pointed out that the former conviction is nothing other than one for rape (*Commonwealth v. Hackett*, 170 Mass. 194), albeit statutory. Hence, it is clear that the conduct specified in the application for the warrant of arrest and the warrant itself arose out of the same conduct for which Pino was convicted. Thus, it is clear to us that the argument regarding lack of a prima facie case of deportability is without merit. In addition, assuming but not conceding that there was an irregularity in the proceedings in this respect, it has been well settled in a long line of cases under the immigration laws that irregularities or deficiencies in the issuance of a warrant of arrest do not invalidate later proceedings where sufficient grounds for deportation have been established and the hearing is not shown to have been unfair (*Bilokunsky v. Todd,* 263 U.S. 149; *Chan Shee v. Nagle,* 9 F 2d 342; *Matter of C—.,* A-7416925, B.I.A., June 22, 1951, Int. Dec. 330). This record definitely demonstrates that Pino's deportability has been established, and the question of a fair hearing will be hereinafter tested fully.

The second allegation of irregularity in the issuance of the warrant of arrest is based on the claim that the Service Official who issued it was not one of the officials specifically authorized to do so. 8 C. F. R. 242.13 provides that any officer mentioned in 8 C. F. R. 241.1(a) who receives an application for a warrant of arrest may issue same if he determines that a prima facie case for deportability has been established. (That question was treated in the paragraph immediately preceding) Section 242.1(a) also provides that a warrant of arrest may be issued by District Directors and other enumerated officers. Section 1.1(a)(8) of the regulations defines District Director as including the officer or employee of the Service who has been designated as the District Director in the absence of the District Director. This record indicates that the Service Official here was properly so designated. No evidence to the contrary has been submitted. Also, it is so well a recognized principle of law as to obviate further discussion that there is a presumption which accords regularity to the acts of Government Officials.

We find that the contention that Pino has been denied opportunity to adequately prepare his defense is without foundation in fact. One of the reasons advanced was that time was needed by counsel to acquire familiarity with the Immigration and Nationality Act. The fact remains that these proceedings were instituted in January 1953. While it is true that the Act did not become effective until December 24, 1952, it was enacted on June 27, 1952. Hence, it had been in the books for approximately six months and was not exactly an entirely new piece of legislation. The warrant was served on January 10, 1953 and the first hearing scheduled for January 28, 1953, a notice of more than two weeks. At that first hearing a charge was lodged supplementing the charge in the warrant and thereafter the hearing was adjourned until February 10, 1953, a period of about two weeks, so that counsel might have an opportunity to prepare to defend against the lodged charge. The hearing held on February 10, 1953 was, on request of counsel, adjourned until February 16, 1953 and thereafter at counsel's request was adjourned until March 6, 1953. It is clear to us that the foregoing facts do not support the claim of lack of time to prepare an adequate defense.

It is also claimed that there was a fatal commingling of investigative, prosecutive and judicial functions on the part of the Special Inquiry Officer. This claim is based on the allegation that said Official undoubtedly examined all of the Service files relating to Pino. In the first place, commingling of functions does not necessarily render a hearing unfair nor deprive the alien of due process (U.S. ex rel *Catalano v. Shaughnessy*, 197 F 2d U.S.; *Belisario v. Zimmerman*, 200 F 2d 282). There is a limitation in the regulations that no Special Inquiry Officer shall conduct a proceeding in any case where he shall have participated in investigative functions. However, the preparation of this case required the Special Inquiry Officer to familiarize himself with the file. On the facts of this case as we see them, the Special Inquiry Officer's conduct did not constitute "investigation" in any generally accepted interpretation of that term. What the Special Inquiry Officer actually did was to so act as to enable him to discharge his obligations, viz—to prepare himself to present evidence, and to examine and cross-examine witnesses.

Moreover, it has been judicially determined that the procedure as outlined in 8 C.F.R. 242(b) provides due process of law. (U.S. ex rel *Marcello v. Ahrens,* U.S.D.C., E.D. La., New Orleans Div., June 8, 1953, 854 Misc.) The record of this hearing shows that the procedure provided in Section 242(b) was meticulously followed. Pino was accorded every safeguard. He had notice of the charges and of the hearing. He was represented by counsel and was given the opportunity to present evidence in his own behalf.

It is further alleged that the hearing was unfair because of a denial of opportunity to cross-examine witnesses [10]. We feel that our treatment of the first procedural argument (supra) adequately disposes of this contention.

Finally, it is contended that the Special Inquiry Officer admitted irrelevant and hearsay evidence which constitute such error as should result in a reversal of the order entered by that official. It is claimed that evidence as to the number of times Pino has been arrested, his criminal record as carried by the Massachusetts Board of Probation, and his criminal record as listed by the Federal Bureau of Investigation has no relationship to the charges on which Pino has been found deportable. In the first place, it is so well recognized as to obviate further discussion that the strict rules of evidence do not apply to administrative proceedings (*Bilokunsky v. Todd,* 263 U.S. 149). Secondly, that evidence was not necessary to or used, either by the Special Inquiry Officer or this Board, in making the requisite finding in this case. Hence, its introduction did not render this proceeding unfair (*Bridges v. Wixon,* 65 S. Ct. 1443). Lastly, the introduction of copies of correspondence with an Assistant Clerk of the Third District Court of Eastern Middlesex (Ex. 10), does not constitute grounds for reversing the decision of the Special Inquiry Officer, for the reasons given immediately preceding; also as a matter of fact, counsel has submitted correspondence from that same officer to support Pino's case.

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[10] On March 4, 1953 the Special Inquiry Officer denied a request for the issuance of the attendance of the Acting District Director and of the Investigating Officer applying for the warrant of arrest.

We find that the hearing accorded Pino was fair in all respects. We have already pointed up our conclusions as to his deportability on the charge lodged at the hearing [11]. The only factor not previously covered in this opinion, and that immaterial here, is that Pino is married to a United States citizen, whom he supports, and has no children.

On the basis of the foregoing, this appeal must be dismissed, and we will now so order.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

APPENDIX

Date of Arrest	*Charge*	*Disposition*
10/23/15	Stealing ride	On file
9/30/16	"	"
10/14/16	Breaking & entering & larceny (2)	"
1/1/16	Playing ball in street	"
6/1/18	"	"
8/13/18	Larceny	Probation
8/17/18	Stealing ride	"
10/25/18	Larceny	- - - - -
11/25/21	"	Suspended sentence

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[11] Cf. Matter of H—., A-3264888, B.I.A., Dec. 12, 1945, for prior decision that placing of case on file in Massachusetts constitutes a "conviction" within the purview of the Immigration Laws.

Date of Arrest	*Charge*	*Disposition*
8/12/22	Breaking & entering	Probation 11/11/22 Filed 11/24/22
3/31/23	Obstructing traffic	On file
5/20/25	Unlawful appropriation auto	6 mos. House of Correction suspended 5/21/26
5/28/26	No license	Filed 6/7/26
7/15/26	Not slowing down	$15 sentence suspended 7/29/26
4/15/27	Speeding	$10 paid
8/4/27	Restricted street	$5 paid
11/15/27	Suspicious person, burglar tools	No bill
(11/25/27) 3/30/28	Carnal abuse of female child	Cf. F. #3, supra, & Exh. #6
12/21/27	Speeding	$15 committed
11/10/31	Attempt to break & enter & larceny, night-time	Dismissed
9/3/32	Met. Dist. Commonwealth rules	Filed
1/13/33	Suspicious person, breaking windows	- - - - -
1/16/33	Breaking & entering, daytime	2 yrs. House of Cor. appealed 12/4/33—not guilty
1/16/33	Accessory before the fact & breaking & entering	Probable cause
6/3/33	Suspicious person, breaking & entering, night-time	- - - - -
6/21/33	Not slowing down	$5 paid
5/4/34	Suspicious person, robbery armed	- - - - -
6/18/34	Speeding	$5 paid
1/28/35	Suspicious person, robbery armed	Released
2/13/35	Suspicious person, breaking & entering	- - - - -

Date of Arrest	*Charge*	*Disposition*
3/19/35	Suspicious person, breaking & entering store	Released
3/11/35	Suspicious person, safe job	"
1/4/36	Suspicious person, murder, armed robbery	- - - - -
1/16/36	Suspicious person, robbery armed	- - - - -
1/29/36	Speeding	$10 paid
2/13/36	Suspicious person, robbery armed	No bill
10/9/36	Suspicious person, armed robbery	- - - - -
11/2/36	Suspicion of larceny	Released on waiver
2/18/37	Conspiracy to steal	No bill
11/27/37	Possessing burglar tools	Dismissed, want of prosecution
1/6/38	Breaking, entering intent to commit felony	3-4 years
	(day) having in possession burglar implements	pardoned 9/6/49
7/12/46	Speeding	$5
12/3/48	Larceny (cf. #3, supra, Exh. #5)	
7/5/50	Violation of fish & game law	$10

Att'y Gen. v. Pelletier, 240 Mass. 264

Karasik v. Bockus, 393 Mass. 371

City of Boston v. Santosuosso, 307 Mass. 302

Comm. v. Gorham, 99 Mass. 420

Mariano v. Judge of District Ct., 243 Mass. 90

Comm. v. Boldi, 250 Mass. 528

Comm. v. Hersey, 324 Mass. 245

Fay v. Harlan, 128 Mass. 244

1944 Op. Att'y Gen. 17

1931 Op. Att'y Gen. 51

Petitioner's Traverse.

I

The petitioner traverses the first sentence of paragraph VI of the Respondent's Return and the respondent's allegation after the semi-colon in said paragraph VI.

II

The petitioner traverses the respondent's denial in paragraph VII of the Respondent's Return.

III

The petitioner traverses the respondent's denial in paragraph IX of the Respondent's Return.

IV

The petitioner traverses the respondent's denial in paragraph X and also traverses his assertion that the hearings accorded petitioner were in accordance with the procedural requirements of the Immigration and Nationality Act and the regulations promulgated thereunder.

V

The petitioner traverses the first sentence in paragraph XI of the Respondent's Return and also traverses the assertion in the second sentence that the lodged charge merely corrected an error of form.

VI

The petitioner traverses the allegation in paragraph XII of the Respondent's Return that counsel for petitioner presented each of his objections separately during the hearing and obtained rulings thereon.

VII

The petitioner traverses paragraph XIII of the Respondent's Return.

VIII

The petitioner traverses paragraph XV of the Respondent's Return.

IX

The petitioner traverses paragraph XVI and each subdivision thereof of the Respondent's Return.

X

And further answering, the petitioner says that the Respondent's Return is incomplete in that it does not include the record of the proceedings which culminated in the deportation order including but not limited to:

A. The warrant for arrest and the application therefor.

B. The request for the issuance of subpoenas dated March 2, 1953.

C. The denial of said request dated March 4, 1953.

D. The record of the proceedings before the Special Inquiry Officer.

E. The decision of the Special Inquiry Officer dated March 24, 1953.

F. The letter dated January 19, 1953 from Henry Nicolls by William F. Wall to the Assistant Clerk of the Third District Court of Eastern Middlesex.

G. The reply dated January 29, 1953.

H. The supplemental letter by the Assistant Clerk of the Third District Court of Eastern Middlesex dated June 4, 1953.

I. The decision of the Board of Immigration Appeals dated August 11, 1953.

J. The order and decision in the deportation case of Anthony Pino dated October 26, 1950 (file No. A-2136979 WU).

By his attorney:

PAUL T. SMITH

Portions of Statement and Argument by Mr. Smith at Hearing January 4, 1954.

(4)

• • •

The Court. I am going to ask you now to make an offer of proof as to what the witnesses will testify.

Mr. Smith. All right, if I must make an offer of proof, I offer to prove that if Herbert F. Callahan were called
(5)
to the witness stand he would testify that it has been the practice in the Commonwealth of Massachusetts for 40 years—that he has specialized on the criminal side of the courts in Massachusetts and that he is an expert with regard to the criminal law of Massachusetts and that if he were to be asked the hypothetical question to the effect as to whether or not a person who has been complained against in the Third District Court of Eastern Middlesex for the crime of larceny of a dozen golf balls, and pleaded not guilty, and was then found guilty, and that the case was placed on file, that that finding would not be a conviction against such a person.

And that he would further testify, in answer to questions, that a judge of the District Court upon his own motion, or that the defendant upon his motion could request that the case be taken off the file and that the defendant could then be sentenced, and that the defendant would then have a right of appeal and to a trial de novo in the Superior Court.

And that he would further testify that even if there had originally been a suspended sentence imposed against such defendant and probation imposed, and that at a later date the judge ordered that the sentence be revoked and the case placed on file, that there would not be a conviction against such a defendant, and that such a defendant would have a right of appeal and a trial de novo in the Superior Court.

It is my understanding that he would further testify
(6)
that while that case is on file, the case is purely in a state of being continued as though it had originally been continued without any finding, and that the rights of the defendant had not been so adjudicated that he couldn't appeal and get a trial de novo.

It is my understanding that if Attorney Francis Juggins were called to the witness stand, he would testify to the same effect.

It is my understanding that if Attorney Louis L. Bobrick of Cambridge were called to the stand, he would testify as an expert also as having been the attorney who defended Pino in the Third District Court of Eastern Middlesex, and would testify that based upon his experience in the Third District Court of Eastern Middlesex, and his experience and training as an attorney in the Commonwealth of Massachusetts, that the finding as it appears upon the record of conviction which is before your Honor now, and which was introduced the last time that we appeared before your Honor—

• • •

(10)
Mr. Smith. And that Mr. Bobrick would further testify, based upon his experience in the Third District Court of Eastern Middlesex, that it is the practice there to revoke sentences on occasion and place a case on file, and that after
(11)
such a case is placed on file that the case could be taken off the file and sentence imposed and an appeal taken to the Superior Court, with a trial de novo.

We also have here, if your Honor please, the assistant clerk of the Third District Court of Eastern Middlesex, who would testify—or it is my understanding that he would testify, that he is familiar with the record in the Pino case as it appears before your Honor, and that as a matter of law, based upon his experience, and as a matter of practice, based upon his experience, that the finding made by the court in the case against Pino over in the Third District Court of Eastern Middlesex, would have an effect of revoking that prior sentence, that the status in the case is that it is on file and that at any time the case can be taken off the file, either upon the motion of the judge or upon motion of the defendant, that a sentence could then be imposed, and that the defendant would have a right to appeal, and a right to a trial de novo.

I might say, from the standpoint of whether or not this witness should testify, that a letter from Mr. Cronin, the assistant clerk of court, was used in evidence by the Board of Appeals, of the Immigration Department, that it was referred to in its findings, that in our petition for a writ of habeas corpus we make reference to it, and I submit, if your Honor please, that Mr. Cronin certainly should be permitted to testify at least in respect to that.

(12)

Also, I might add that I understand Mr. Cronin is here under government subpoena.

There is another witness by the name of James F. Monahan, who is a member of the bar of Massachusetts, an assistant clerk of the Boston Municipal Court, who has been such for some 30 years. He has been assistant clerk in the criminal side of the court, and if allowed to testify, he would testify, based upon his experience as a lawyer, that when a defendant has been convicted and given a suspended sentence and probation, and then at a later date that sentence is revoked and the case placed on file, that that defendant at any time is subjected to having the case taken off file, a sentence imposed, and that at that time he would have a right of appeal to the Superior Court, and a trial de novo.

He would also testify that that is the practice which has been followed in the Boston Municipal Court, which I think your Honor understands is probably the busiest court in the Commonwealth of Massachusetts.

In addition to that, all of the aforementioned witnesses would testify to a hypothetical question that assuming a person was complained against for larceny of a dozen golf balls, and pleaded not guilty and went to trial and was found guilty, and was sentenced to one year in the House of Correction, and appealed therefrom and then withdrew his appeal, and the sentence was suspended by the District Court with an order of a year's probation; and that there-
(13)
after there was a motion for a new trial, and the motion for new trial was granted, and that upon hearing at the new trial there was a finding of guilty and a sentence of a year in the House of Correction, from which there was an appeal, and that subsequently that appeal was withdrawn and there was a sentence of a year in the House of Correction, suspended, and a year's probation; and that upon the date of January 20 of 1953, that the sentence was revoked by order of the court, and placed on file, so that docket entry appears and so that record appears that the court revoked the sentence and placed the case on file, and that in that case the case is on file as of today and that the District Court upon motion of its own, or upon motion of the defendant, could remove the case—

Mr. Medalie. This is the most unreliable offer of proof I have ever heard.

Mr. Smith. Well, I don't know—

The Court. I will let Mr. Smith continue.

Mr. Smith. That in such an event the case would still be on file, and that upon motion of either the defendant or the court, the matter could be removed from the file, the defendant sentenced, and that he would have a right of appeal and a trial de novo.

That is what I expect these witnesses to testify to. * * *

* * *

(32)

Mr. Medalie. In the first place, we have no doubt as to the position of eminence in the criminal field of these witnesses and their long and capable experience in the field, * * *

* * *

(34)

The Court. I am ruling it is a matter of law, that it is a matter for me to pass on, and I have to pass on the question of whether or not that is a legal conviction. I don't think it rests with the lawyers to tell me; I have got to find the law myself. I will preserve your rights. I may be wrong, but they are preserved for the Circuit Court of Appeals, and I will exclude it.

* * *

(36)

Mr. Smith. With respect to the certified copy of the record of the alleged conviction of Anthony Pino concerning the golf balls, the larceny of the golf balls, it is agreed that that may go in, with the exception that the attention of the Court should be drawn to the fact that on the back of that record it is agreed by counsel that where the words appear "January 28, 1949, appeal withdrawn by leave of court and original sentence one year House of Correction suspended", that following the word suspended the word "to" should appear, suspended to January 30, 1950. It should also appear that there is a period thereafter, and then the
(37)
words "appeal waived" and then a period after the word waived, and that the last item thereon in this record is

"sentence revoked" and then a period. And then "on file". They apparently did not in this record use any periods or commas, and we have agreed that is what it should be.

Mr. Medalie. I think it should also be stated, if we treat the January 30, 1950 as applying to what follows the entry of January 28, 1949, that it should be agreed between counsel that the entry of "sentence revoked; on file" occurred on January 30, 1950.

Mr. Smith. Yes, we agree to that.

Mr. Goodman. And the "appeal waived" entry occurred on January 28, 1949.

Mr. Medalie. I will agree to that.

Mr. Smith. It is agreed that the "appeal waived" entry is as of January 28, 1949, and that the "sentence revoked; on file" entry is as of January 30, 1950, right?

Mr. Medalie. That is correct.

* * *

(45)

* * * I ask at this point to have your Honor take judicial notice of the fact that the law in Massachusetts is that when a person is brought before the District Court, any District Court of the Commonwealth of Massachusetts, charged with a crime within the jurisdiction of that court, and he pleads not guilty and is found guilty and is then sentenced and appeals from that sentence and then withdraws his appeal and makes a motion for a new trial, and that motion is granted, and thereafter he is tried and still pleads not guilty and is found guilty and sentenced to a year in the House of Correction and appeals therefrom, and then withdraws his appeal and is given a suspended sentence and a year's probation, and that on a day equal to the same date that he was given the suspended sentence and probation, that is, one year later, the Court makes an order revoking the sentence and placing the case on file,

that that is not as a matter of law, in Massachusetts, a conviction.

The Court. If I made that decision—don't misunderstand me; I am not finding any fault with you, but if I decide that, that is the end of this case. Don't you agree with me, Mr. United States Attorney?

Mr. Medalie. I think you are right, your Honor, yes.

* * *

(46)

The Court. I couldn't take judicial notice of it. I have to make a determination of it later on.

* * *

Order.

McCarthy, J. After hearing on a writ of habeas corpus, and in accordance with the Opinion handed down February 1, 1954, it is

Ordered that the Writ be and it hereby is discharged, and the petition is dismissed.

By the Court:
JOHN F. DAVIS
Deputy Clerk

William T. McCarthy
United States District Judge
February 1, 1954

Opinion.

February 1, 1954

McCarthy, D. J.

The petitioner, Anthony Pino, has come before this court on a petition for a writ of habeas corpus arising out of a deportation order predicated upon provisions of the Immigration and Nationality Act of 1952, with particular application to Section 241(a)(4), 8 U.S.C.A. Sec. 1251(a)(4). This petitioner had been ordered deported upon the ground that he had been convicted after entering the United States of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. He had exhausted his administrative remedies and then filed the instant petition for the issuance of the Great Writ contending that the state of a record in the Third District Court of Eastern Middlesex, Commonwealth of Massachusetts, did not satisfy the definition of a conviction and that his right to due process under the Fifth Amendment of the Constitution of the United States in the deportation proceedings was denied. This court issued the writ and the body of the petitioner was produced at the hearing.

The facts and circumstances surround a fifty-eight year old married alien who was born in Divieto, Messina, Italy, on May 7, 1907, and was admitted to the United States on May 28, 1908, for permanent residence. At that time he was accompanied by his mother, was a little over a year old, and from that time down to the present he has maintained a residence in the United States.

The deportation order is based upon a charge that in 1928 the petitioner was convicted of carnal abuse and that in 1949 he was convicted of the larceny of a dozen golf balls. The Court quotes from paragraph VI of the petition which reads in part: "The petitioner has not been convicted of the larceny of twelve golf balls since that case is presently pending in the Third District Court of Eastern Middlesex, Cambridge, Massachusetts, the case having been placed on file. If and when the petitioner is sentenced he will have a right of appeal to the Superior Court and to a trial de novo . . ."

It is the contention of the petitioner that in order to have a conviction within the meaning of the Immigration and Nationality Act there must be a sentence or final disposition, that there is no such status here because the case may be "taken from the file", sentence imposed, and an appeal taken to the Massachusetts Superior Court, thereby vacating the entire proceedings of the lower court and restoring the case to a "de novo" status.

The record shows, and I find it a fact, that on December 28, 1948, he was found guilty on a charge of stealing one dozen golf balls and was sentenced to a year in the House of Correction; he promptly appealed the decision of the lower court, posted a bond, and was bailed; then on December 28th, within the statutory time permitting a person to withdraw an appeal from a sentence, the appeal was withdrawn, a motion for a new trial was filed by the petitioner, and this motion was allowed. On January 4, 1949, there was a trial "de novo" on the same complaint and the petitioner was again found guilty and was sentenced to a year in the House of Correction, from which an appeal was promptly taken; on January 28th this appeal was again withdrawn; the District Court judge reimposed the sentence, then suspended it, and made an order to put this petitioner on probation with the sentence suspended until January 30, 1950, and on the latter date, when the period of probation expired, the sentence was revoked, and the case was placed on file. On February 3, 1953, a motion for a new trial was filed. That motion was taken under consideration by another judge of the District Court and at the time of the filing of this petition there had been no decision on the motion for a new trial.

Since the crime of larceny of which the petitioner is alleged to have been convicted occurred in the Commonwealth of Massachusetts, the Court must look to the law of Massachusetts for the purpose of determining whether or not the history of this case in the Third District Court reveals a conviction. *United States ex rel. Freislinger v. Smith*, 7 Cir., 41 F. 2d 707.

In *Commonwealth v. Gorham*, 99 Mass. 420, the defendant in an arson case offered himself as a witness. The prosecutor, for the purpose of impeaching his credibility, offered in evidence an indictment for forgery and the court record which showed that the defendant had pleaded guilty, after which plea the indictment was placed on file, but which afterwards had been brought forward and was pending at the time of the trial of the defendant. Exceptions to the admission of this evidence were sustained and the court stated the following: "The term 'conviction' is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty, but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt . . . We think . . . that the word 'conviction' is here (Gen. Sts. c. 131 sec. 13) used in the broader and less technical sense, and implies the judgment of the court. . . . " (at page 422).

The landmark definition of the word "conviction", in Massachusetts law, is to be found in *Commonwealth vs. Lockwood*, 109 Mass. 323, 325. The issue in this case was whether under the Constitution of the Commonwealth prohibiting the Governor from pardoning a defendant *until his conviction*, the executive and the Council had acted prematurely in granting a pardon to a defendant who had been found guilty but as against whom no judgment had been made. The Court said: "The ordinary legal meaning of 'conviction', when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained . . ." The pardon was, therefore, held to be valid.

The Supreme Judicial Court had occasion, in *Commonwealth v. Kiley,* 150 Mass. 325, to define the term "conviction" as used in St. 1887, c. 392, which provided that "the conviction by a court of competent jurisdiction of a person licensed under the provisions of" laws relating to licenses to sell intoxicating liquors would of itself make the person's license void. The court said, at page 326, "Under this provision, the effect of a conviction of the kind named is to deprive the defendant of a valuable right, without an opportunity for further trial or investigation. We are of opinion that nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used. At any time before a final judgment of the court, a motion in arrest of judgment may be made, or the verdict may be set aside upon a motion for a new trial, on the ground of newly discovered evidence, or for other good cause; and, upon further proceedings, it may turn out that the defendant is not guilty." For the purpose of this statute, therefore, "conviction" meant more than a finding or confession of guilt.

In *Munkley v. Hoyt*, 179 Mass. 108, a petition was brought for a writ of certiorari to correct proceedings of the board of registration in pharmacy. It appeared that the petitioner had pleaded guilty to a complaint for the illegal sale of intoxicating liquor. On his motion, the court placed the complaint on file and took no further action. St. 1896, c. 397, sec. 9 provided that the board of registration might, after hearing suspend or revoke a pharmacist's registration for cause, but that the registration should not be suspended or revoked *for a cause punishable by law* until after conviction by a court of competent jurisdiction.

Interpreting the statute, the court said that (at page 111) "the plain purpose of the statute is that the hearing before the board shall be independent of any proceeding before any other court or tribunal, and that the decision of the board shall be upon the evidence produced there and not elsewhere. The record of the conviction of the accused by a verdict of a jury is not admissible at the hearing as evidence of his guilt. It is true that proof of his confession in open court of his guilt would be admissible against him at the hearing just as any other admission of guilt made by him would be, wherever made, but not upon the ground that such confession is conviction but that it is an admission. In no way is the judgment of the board upon the question of the guilt of the accused to be affected by the proceeding in another court." A conviction in a court of competent jurisdiction, therefore, was deemed to be a condition precedent to suspension or revocation of registration by the board, but the conviction was not to be considered as evidence upon which, in and of itself, the judgment of the board was to be predicated. The term "conviction" was given its ordinary legal meaning which, said the court, provided an independent hearing before each tribunal and independent action on the part of each.

A careful study of the foregoing decisions and of the others cited by both the petitioner and the respondent requires the conclusion that the record of the case involving the larceny of a dozen golf balls represents a conviction under Massachusetts law, for the primary reason that there need not be a sentence or final disposition in order for a conviction to be had.

In certain situations, as shown above, the technical requirements of statutes have engrafted upon the ordinary meaning of conviction the requirement of a sentence. Where, for example, one sought to use a record of "conviction" to impeach the credibility of a witness, Mass. G.L.

(Ter. Ed.) c. 233, Sec. 21, as interpreted by the Supreme Judicial Court, imported a sentence. *Karasek v. Bockus,* 293 Mass. 371. *Attorney General v. Pelletier,* 240 Mass. 264. *Boston v. Santosuosso,* 307 Mass. 302, 330. The definition in the *Lockwood* case, supra, however, controls ordinarily and, with respect to the so-called "impeachment statute", its wording has now been changed to define "conviction", when referring to a felony conviction at least, simply as "a plea of guilty or a finding or verdict of guilty."

The conclusion that the ordinary legal meaning of "conviction" is to be employed when the court is concerned with a construction of Title 8, U.S.C.A. sec. 1251(a)(4) is buttressed by the fact that Congress in 1952, when it amended this section of the deportation statute, eliminated the earlier requirement that imprisonment was a prerequisite to deportation. Congress is now concerned only with whether or not the alien has pleaded or been found guilty of two crimes involving moral turpitude.

There is a second phase of the petitioner's argument—the contention that since, on January 30, 1950 the Third District Court of Eastern Middlesex "revoked" the sentence which it had earlier imposed upon the petitioner and placed the case "on file", the case is restored to a posture where the court or the petitioner could reopen the case at any time, sentence might be imposed and an appeal might be taken to the Superior Court of Massachusetts, where a trial "de novo" could be had.

In this respect, the original court record is important, since it discloses that after a finding of guilty the petitioner was sentenced to a year in the House of Correction, the sentence was suspended to January 30, 1950, and, after the entire period of probation had been served, the original sentence was revoked and the case then placed on file.

There is statutory authority in the Commonwealth of Massachusetts for disposing of a criminal complaint by placing it on file. Mass. G.L. (Ter. Ed.) c. 218, sec. 38. The court may, furthermore, when a sentence of imprisonment is imposed, order execution of the sentence or, under the suspended sentence statute, G.L. c. 279, sec. 1, suspend the execution of the sentence and place the petitioner on probation. When, however, a sentence is suspended as in the instant case and the probationary period has been completed satisfactorily, the trial judge of the District Court of Eastern Middlesex had no authority to revoke the order suspending the sentence, place the case on file, and hold the threat of a sentence over a defendant's head forever. The district courts of Massachusetts have no power to keep a defendant on indefinite probation. *Commonwealth v. Maloney,* 145 Mass. 205.

The petitioner contends that a criminal case placed on file can be re-opened at any time and his attorney cites the cases of *Commonwealth v. Dowdican's Bail,* 115 Mass. 153, *Marks v. Wentworth,* 199 Mass. 44, and *Commonwealth v. Carver,* 224 Mass. 42. I have no quarrel with the law for the reason that in these three cases there never was an imposition of sentence.

This court is satisfied that under Massachusetts law the petitioner was convicted of larceny, which conviction satisfies the requirements of Section 241(a)(4) of the Immigration and Nationality Act of 1952.

The petitioner further asserts that the conduct of the proceedings upon which the order of deportation was predicated was in violation of his rights under the due process clause of the Fifth Amendment of the United States Constitution because the issuance of the warrant of arrest was irregular since the application specified that the petitioner had been convicted of "assault with intent to rape and rape" and "larceny", whereas court records showed that the first conviction with which we are concerned was for carnal abuse of a female child. The special inquiry officer lodged the charge of carnal abuse. There is no necessity for a prolonged discussion on the merits of this claim. It is sufficient to note that the titular designation of Section 23 of Chapter 265 of the General Laws of Massachusetts is "Rape of Child" and that "carnal knowledge" and "abuse" is contained in the language following the designation. While there may have been an error of description in the application for the warrant, it is not the purpose or intention of this court to examine, approve or disapprove of every step and ruling in the proceedings before the Special Inquiry Officer, for the simple reason that this is not the function of the Court. *Berkman v. Tillinghast,* 1 Cir. 58 F. 2d, 621, 623. Nevertheless, the Court has given considerable time and serious consideration to each of the charges lodged by the petitioner before arriving at the conclusion that there was no error committed by the officer so flagrant as to deny to Pino the essentially fair hearing which was due to him.

In passing it might be well to note a few of the petitioner's contentions with respect to denial of procedural due process, without going too far into details. He claims that he was denied an opportunity to prepare his defense adequately, although the record shows a first notice of more than two weeks, and three periods of adjournment thereafter, which facts do not support the claim of lack of time. A "commingling of investigative, prosecutive and judicial functions on the part of the Special Inquiry Officer" is also charged. There is no evidence, however, that the officer exercised any investigative function. He may have carefully studied the file in the case, but certainly no one could contend that that constituted an investigation. It is inescapably clear also that this court cannot conclude that the officer had pre-judged the case.

Of more serious significance is the claim that the right of the petitioner was infringed by the introduction of a record of arrests and several convictions. This record was a lengthy one and noted some very serious charges which did not result in arrest, trial, or punishment. I am satisfied that this record should not have been introduced because of its highly incendiary character, but an examination of it discloses the fact that it was wholly unnecessary in reaching the conclusion that the petitioner had been convicted twice of crimes involving moral turpitude. It follows, therefore, that the introduction of this record did not render the proceeding unfair, especially in view of the fact that strict rules of evidence applicable in judicial proceedings do not obtain in deportation inquiries. *Berkman v. Tillinghast*, supra.

Finally, it was contended by the petitioner's counsel that the crimes for which Pino was convicted, assuming that he was convicted, necessarily involve the essential elements of moral turpitude. In connection with the conviction for carnal abuse, under Massachusetts General Laws, c. 265, sec. 23, this claim is without merit. This crime has been classified as so-called "statutory rape" the punishment for the commission of which could well have taken the form of a life sentence, and that it is an act of depravity in the private and social duties a man owes society in general cannot be doubted. *Ng Sui Wing v. United States*, 7 Cir. 46 F2d 755. *Bengel v. Nagle,* 9 Cir. 17 F. 2d 719. The basis for the deportation order for the second conviction is that which charges the larceny of a dozen golf balls.

It is inescapably clear that an act involving moral turpitude is an act of baseness or depravity contrary to accepted moral standards. While there may be a predilection that the theft of a dozen golf balls does not come within the purview from a moral point of view of this definition, this Court is bound to accept established precedents of courts of appellate jurisdiction. The ruling case in this circuit is *Tillinghast v. Edmead,* 1 Cir., 31 F. 2d 81, which affirms the principle that a conviction of petty larceny is the conviction of a crime involving moral turpitude. It is indisputably clear also under Massachusetts law that larceny of less than one hundred dollars is a misdemeanor. Although one may agree with the statement of Judge Anderson in his dissenting opinion in the Tillinghast case that "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude", such is the law not only in this circuit, but also in other circuits. It is the duty of a judge of a District Court of the United States to follow the law as it is beaconlighted by the decisions of courts of higher jurisdiction. The Court of Appeals for this circuit has spoken in the case of *Tillinghast v. Edmead.*

It is inescapably clear, therefore, that this writ must be and it is hereby ordered discharged.

Notice of Appeal to the Court of Appeals under Rule 73(b).

Notice is hereby given that Anthony Pino, petitioner in this action, hereby appeals to the United States Court of Appeals for the First Circuit from the decision and order discharging the writ of habeas corpus entered in this action on February 1, 1954.

PAUL T. SMITH
Attorney for Appellant, Anthony Pino
209 Washington Street
Boston 8, Massachusetts

[U.S. Dist. Ct.
Filed in Clerk's Office
Feb. 2, 1954
Mass. Dist.]

Motion for Bail Pending Appeal.

Now comes the petitioner in the above entitled action and moves that he be enlarged upon such bail as to this Honorable Court may appear fitting in the circumstances of this particular case.

By his attorney:
PAUL T. SMITH

Feb 2, 1954, McCarthy J
Denied after hearing

By the Court
JOHN F DAVIS
Deputy Clerk

Request for Rulings of Law.

Pending review of a decision discharging a writ of habeas corpus after it has been issued, the petitioner may be enlarged upon such recognizance with surety as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

By his attorney:
PAUL T. SMITH

Note

This request is merely a quotation from Rule 38 of the Rules of the Circuit Court of Appeals. The Rules of the Circuit Court of Appeals were revised and reissued on July 1, 1953, after the McCarran Act, but no change was made in Rule 38. Obviously, the Circuit Court of Appeals in reissuing Rule 38 holds that the McCarran Act did not limit that rule. We cannot follow the United States Attorney's argument that Rule 38 is limited by the McCarran Act which came before the rule itself was reissued.

Feb 2, 1954, McCarthy J
Denied, By the Court
JOHN F DAVIS
Deputy Clerk

Portions of Statement by Court from Transcript of Hearing Dated February 2, 1954, on Motion for Bail Pending Appeal.

* * *

(29)

It is my considered judgment that I have no authority, as I interpret Section 1252, as I read it, and in the light of established precedents in this district, to enlarge this petitioner on bail.

I want to be frank with counsel because I think it is important for me to make a decision so that the matter can proceed forthwith with an appeal and therefore the request for rulings of law:

> "Pending review of a decision discharging a writ
>
> (30)
>
> of habeas corpus after it has been issued, the petitioner may be enlarged upon such recognizance with surety as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case."

is denied.

I could have taken it under advisement but I have made an examination and research and it is my considered judgment that I haven't the authority. If I did, Mr. Katz, I would be very happy to, but I haven't the authority.

Notice of Appeal to the Court of Appeals under Rule 73(b).

Notice is hereby given that Anthony Pino, petitioner in this action, hereby appeals to the United States Court of Appeals for the First Circuit from the order denying the petitioner's motion for bail pending appeal entered in this action on February 2, 1954.

PAUL T SMITH
Attorney for Appellant, Anthony Pino
209 Washington Street
Boston 8, Massachusetts

[United States Dist. Ct.
Filed in Clerk's Office
Feb 2 1954
Mass. Dist.]

Appendix to Brief for Appellee

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED JANUARY 28, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).

By Special Inquiry Officer to Respondent:

Q. The original warrant of arrest in this case has been endorsed to show that it was served on you, at Boston, Massachusetts, on January 10, 1953, at which time you were told why you were arrested, you were told of the conditions under which you might be released from custody, you were told at that time of your right to have an attorney, and you were furnished with a copy of the warrant. Is that information correct?

A. Yes.

Q. A copy of this warrant of arrest is now entered into the record as Exhibit No. 1. This warrant charges you with being subject to deportation under the provisions of Section 241(a) (4) of the Immigration and Nationality Act, in that, at any time after your entry into this country, you have been convicted of two crimes involving moral turpitude, namely: Assault with intent to rape and rape; and larceny; such crimes not arising out of a single scheme of misconduct. Do you understand the charge?

A. Yes.

Q. Do you understand that I have entered a copy of your warrant as Exhibit No. 1?

A. Yes, sir.

Q. You are hereby advised that you will have a reasonable opportunity to examine the evidence against you, to present evidence in your own behalf, and to cross-examine witnesses presented by the Government. These functions of course will be done by your counsel. Is that understood?

A. Yes, sir.

Q. What is your age today?

A. Forty-five.

Q. What is the year of your birth?

A. May 7, 1907.

[fol. 120] Q. Where were you born?

A. Messina, Sicily, Italy.

Q. Were you born in the city of Messina, or one of the outlying towns?

A. One of the outlying towns. I don't know how it is spelled.

Q. According to the information contained in my file, it appears that you were born in Divieto, Messina, Italy. Will you agree that this is the place where you were born?

A. Yes.

Q. Of what country are you a citizen?

A. Italy.

Q. Of what race of people are you?

A. Italian.

Q. How many times have you come to the United States?

A. Once.

Q. Can you place the date of your entry into this country?

A. Somewhere around 1908, I am not sure.

Q. I will refresh your memory on what the warrent alleges. It states May 25, 1908, at the port of Boston, Massachusetts, on the SS ROMANTIC. To the best of your knowledge and belief, are those the facts of your entry?

A. Yes.

Q. For what purpose were you coming here?

A. To live.

Q. Were you accompanied by any one at that time?

A. By my mother.

Q. I show you a Certificate of Admission of Alien Form 505, dated March 28, 1936, at Boston, Massachusetts, showing the admission for permanent residence, on the SS ROMANIC, at Boston, Massachusetts, May 25, 1908, of Antonio Pino, accompanied by Caterina Pino. After you have examined this document, please advise me if in your opinion it relates to your admission to the United States for permanent residence? (Document examined by counsel and respondent.)

A. Yes.

Q. A copy of this Certificate of Admission of Alien, which you have identified, is entered into this record as Exhibit No. 2. Do you understand?

A. Yes, sir.

* * * * * * *

[fol. 121] Q. I show you a certified copy of conviction in the case of the *Commonwealth* v. *Anthony Pino*, docket No. 8649, Third District Court of Eastern Middlesex, Cambridge, Massachusetts, consisting of a complaint charging Anthony Pino with larceny; and court docket wherein a plea was originally entered of not guilty and a judgment of guilty was found on December 23, 1948 from which an appeal was taken; and which also contains the entry that on December 28, 1948 appeal was withdrawn by leave of court and on the same day a motion for a new trial was allowed and the finding revoked; on January 4, 1949 there was a judgment of guilty and a sentence of one year in the House of Correction; appealed on January 10, 1949; January 28, 1949 appeal withdrawn by leave of court and original sentence of one year in the House of Correction suspended; last entry on the docket showing January 30, 1950 sentence revoked and matter placed on file. Does this record relate to you?

A. Yes.

By Counsel: This certified copy relates in part to the stealing of twelve golf balls of value less than $100.

By Special Inquiry Officer to Respondent:

Q. This document is entered into the record as Exhibit No. 5. Is this understood by the respondent?

A. Yes, sir.

Q. I show you a certified copy of conviction, Docket number 1586 of 1928, Superior Court, Boston, Massachusetts, consisting of an indictment of Anthony Pino and others for abuse of a female child; and court record showing that the indictment was found January 9, 1928; and January 16, 1928, Pino pleaded guilty to said indictment; January 17, 1928, after part of testimony was introduced, said Pino was called in said court and was defaulted; March 15, 1928, said Pino was again tried by a petit jury; March 20, 1928, said jury returned a verdict that said Pino was guilty of said indictment; March 29, 1928, Pino for the crime set [fol. 122] forth in the indictment was sentenced to be committed to the Massachusetts Reformatory, Concord, Massachusetts for a term of five years and one day. After examining this document, please advise me if it relates to you?

A. Yes.

Q. This document is made a part of the record and marked Exhibit No. 6. Do you understand?

A. Yes.

Q. As you and counsel were previously advised you would be offered a reasonable opportunity to examine the evidence in this case, which consists of Exhibits No. 5 and No. 6, it is now made available to you for further examination.

A. (By counsel): Thank you, we have examined.

Q. In view of the evidence now at hand, I charge you with being in the United States in violation of Section 241(a) (4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: Abuse of a female child; and larceny. Do you understand the nature of the new charge lodged against you?

A. Yes, sir.

By Special Inquiry Officer to Counsel:

Q. Under the existing regulations which flow from the Immigration and Nationality Act, when a new charge is lodged during the course of a proceeding, counsel may request an adjournment for the purpose of preparing his defense on the new charge.

A. I so request and, first of all, request your indulgence while I have a conference with my esteemed associate here.

(Recess permitted by Special Inquiry Officer for purpose requested.)

By Special Inquiry Officer:

Unless you are notified by the District Director to the contrary, the hearing will be resumed February 10, 1953, at 9:00 A.M. The hearing is now adjourned.

• • • • • • •

[fol. 123] EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED FEBRUARY 10, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).

By Special Inquiry Officer: Motion is granted. Adjournment is had until Monday, February 16, 1955, at 1:00 P.M., at this office.

By Counsel: Mr. Special Inquiry Officer, at this time I make the request that I be loaned a transcript of the record of the first hearing.

By Special Inquiry Officer: One copy thereof is loaned to you with the instructions against making copies thereof and as to returning it to this Service on demand, as required by the Immigration regulations.

• • • • • • •

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED FEBRUARY 16, 1953, EXAMINATION OF ANTHONY PINO (LAWRENCE F. O'DONNELL, ATTORNEY OF RECORD).

By Special Inquiry Officer: With reference to counsel's request that the investigator be produced in order that he may be cross-examined, you are advised that warrant of arrest in this case was not predicated upon an investigation made by any investigator but rather was predicated on evidence contained in the file of Mr. Anthony Pino. You were previously furnished, in accordance with the regulations, the evidence at hand in the case. To satisfy you, I shall show you, as contained in the file, the application for the warrant of arrest which shows that it was based on two certified copies of conviction only.

The motion is therefore denied. Please proceed.

[fol. 124] By counsel: I take my exception to a denial of that motion.

I can't conceive how any arrest could be effected without a preliminary investigation. It follows of necessity there had to be an investigation and the Immigration and Naturalization Service has an Investigation Department and I feel, in order to properly conduct the offense, in addition to preparation, there should be an opportunity to cross-examine the accusers, as provided in the Act.

By Special Inquiry Officer: As you were told before, the warrant of arrest is based on certified copies of conviction rather than on the report of an investigation. It is conceded that the application for the warrant of arrest was made by the Investigation Section of this Service, but it appears that it was based on a review of the file.

• • • • • • •

By Special Inquiry Officer to Counsel:

Q. Does counsel at this time refuse to begin the questioning of the respondent, for which this hearing was adjourned on February 10th?

A. It isn't a question of refusing. It is a question that presupposes that before you start asking any questions, whether you have the capacity to ask and whether you have the information on subject matter you are to discuss. You are taking ten steps ahead of the elementary position. It isn't a question of refusal. It is a question of fundamental capacity.

By Special Inquiry Officer: The issues before me in this hearing are two convictions, certified copies of which were made available to you and to the respondent during the course of this proceeding. They are not unusual issues. They are the Government's evidence in the case. The issues will be narrowed simply to whether or not the respondent is deportable because of these two convictions, nothing else.

• • • • • • •

[fol. 125] EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE THE SPECIAL INQUIRY OFFICER, DATED MARCH 6, 1953, EXAMINATION OF ANTHONY PINO (PAUL T. SMITH AND MANUEL KATZ, ATTORNEYS OF RECORD).

By Counsel: May it appear on the record that counsel feels that he is as fully familiar with the procedure under the McCarran Act as the Special Inquiry Officer; that counsel does not feel that he needs any instruction as to the procedure of law; and that counsel is fully prepared to take care of his client and present the evidence adequately; • • •

• • • • • • •

By Counsel: Can it be agreed that the warrant in this case was issued only upon the evidence set forth in the application for warrant marked Exhibit No. 8?

By Special Inquiry Officer: Since the application for the warrant states that a warrant be issued on the basis of certified copies of court records numbers 1586-1928 and 8649-1948, it is agreed insofar as that statement appears in the application for the warrant.

By Counsel: May it appear on the record that counsel for the respondent disagrees with the ruling of the Special Inquiry Officer, that is the ruling of law of the Special Inquiry Officer, and contends that under the McCarran Act the officer issuing the warrant must be satisfied that there has been a prima facie case made out based on the contents of the application for warrant and an objection and exception are made to the Special Inquiry Officer's ruling.

• • • • • • •

By Counsel: May it be agreed that if the Special Inquiry Officer had investigated this case, that he would not be qualified to sit as Special Inquiry Officer?

[fol. 126] By Special Inquiry Officer: It is so agreed, with however the understanding that, "Investigation", as used by counsel is subject to interpretation.

EXCERPTS FROM HEARING BEFORE McCARTHY, J. ON JANUARY 4, 1954

Case No. 53-79-M

* * * * * * *

The Court: Now I have got it up to date. Mr. Smith has furnished his offer of proof, and I am going to give you a chance to be heard on it. What do you say in answer to Mr. Smith's offer of proof?

Mr. Medalie: In the first place, we have no doubt as to the position of eminence in the criminal field of these witnesses and their long and capable experience in the field, although it would probably be the first time that expert testimony was permitted in the federal court on a clear question of law, which is the fundamental question of law before this court.

* * * * * * *

* * * And it has never been proper to prove a question of law by witnesses. The question of the meaning of this record is to be determined by your Honor's investigation of what the law of Massachusetts is, and what the meaning of the word conviction is in the Immigration and Naturalization Act of 1952.

No amount of expert testimony can tell you now what Congress meant or what the Supreme Judicial Court meant; that is a matter of law fairly (sic) for the Court, and I submit that no expert testimony is admissible here on the question of the practice or procedure in the courts, or on the question of the meaning of the word conviction.

* * * * * * *

[fol. 127] Mr. Smith: We are not asking for that. We are asking you to take judicial notice as to what the law is with respect to a conviction in Massachusetts. Now, there is only one of three ways we can get evidence before your Honor about that, and that is either by your taking judicial notice, by listening to expert testimony, and by citations, as a matter of evidence, not as a matter of——

The Court: I will let you give me citations, and I will make the decision. I have got to make the decision.

Mr. Smith: Then may I give you the citations now, by way of evidence and not by way of argument on the law of the case?

The Court: No, I won't take it by way of evidence. I will take it only in the form of a brief. And that applies to you, Mr. Medalie; I am not making a special ruling for one and another ruling for the other. I am not going to take citations in the form of evidence. I will take them in a brief.

• • • • • • •

The Court: Do I understand, Mr. Smith, that with the admission of that record, and the motion to incorporate the records covered by this document before me which has been marked by my direction Petitioner's Exhibit 1, that outside of that you haven't any evidence to present at the present time?

Mr. Smith: Yes, Your Honor.

• • • • • • •

The Court: All right, I will hear you tomorrow morning at ten o'clock. How much time will you require for argument?

Mr. Smith: I should like to have it appear for the record that what I intend to use, what your Honor has termed as argument, will be the presentation of citations which I [fols. 128-135] feel properly belong in the realm of evidence. And I should think that the whole matter shouldn't take any more than about three-quarters of an hour, in my opinion.

[fol. 136] IN UNITED STATES COURT OF APPEALS

ARGUMENT AND SUBMISSION—June 2, 1954

Thereafter, to wit on June 2, 1954, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

[File endorsement omitted.]

[fol. 137] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4832

ANTHONY PINO, Petitioner, Appellant,

v.

HENRY NICOLIS, District Director of Immigration and Naturalization, Respondent, Appellee.

No. 4833

SAME v. SAME

Appeals From the United States District Court for the District of Massachusetts.

[119 F. Supp. 122]

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges

Reuben Goodman, with whom Paul T. Smith and Manuel Katz were on brief, for appellant.

Jerome Medalie, Assistant U. S. Attorney, with whom Anthony Julian, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—Filed August 2, 1954

MAGRUDER, *Chief Judge.* Anthony Pino, an alien who has been ordered to be deported pursuant to § 241(a)(4) of the Immigration and Nationality Act (66 Stat. 204), filed in the district court a petition for a writ of habeas corpus. The district court issued the writ, held a hearing thereon, and on February 1, 1954, entered an order discharging the writ [fol. 138] and dismissing the petition with an accompanying opinion coming to the conclusion, as had the Board of Immigration Appeals, that the warrant of deportation had been lawfully issued by the Special Inquiry Officer. 119 F.Supp. 122. Pino's appeal from this order of the district court is docketed in this court as No. 4832. Also, Pino filed in the district court a motion to be enlarged on bail pending appeal. Upon denial of this motion on February 2, 1954, Pino took an appeal (No. 4833) from the order of denial. On March 11, 1954, this court denied an interlocutory motion by Pino asking us to enlarge him on bail pending appeal. 211 F.2d 393. Subsequently, by administrative action of the Attorney General, Pino was admitted to bail pending these appellate proceedings, with the result that the appeal in No. 4833 has become moot and will be dismissed on that ground. However, we still have before us the main appeal in No. 4832, involving the validity of the warrant of deportation.

Appellant was born in Italy, and was brought to this country in 1908 when he was one year old. He has maintained a residence here since that time, but has not become an American citizen.

It appears from the record that a warrant of arrest was issued against Pino on April 20, 1938, in an earlier atttempt to deport him under § 19 of the Immigration Act of 1917 (39 Stat. 889) in that, after passage of that Act, the alien had, as alleged, been sentenced more than once to imprisonment for a term of one year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry". This deportation proceeding was based upon (1) a conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory in Concord, and (2) a [fol. 139] conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of breaking and entering a building in the daytime with intent to commit a felony therein, for which offense he was sentenced to a term of from three to four years in the Massachusetts State Prison, and (3) a conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of illegal possession of burglary tools, for which offense he was sentenced to a term of from three to four years in Massachusetts State Prison, to be served consecutively after expiration of the sentence for breaking and entering. For some undisclosed reason, the deportation proceeding dragged on, until finally, on September 6, 1949, Pino obtained from the Acting Governor of Massachusetts and Council a full pardon for each of the two offenses listed in (2) and (3) above. Under § 19 of the Immigration Act of 1917, those pardons cut the ground from under the earlier deportation proceeding; and on October 26, 1950, an Assistant Commissioner of the Immigration and Naturalization Service ordered the cancellation of the warrant of arrest dated April 20, 1938.

Subsequently, on June 27, 1952, Congress passed the Immigration and Nationality Act (66 Stat. 163) making important changes in the requirements for deportation of aliens.

The presently pending deportation proceeding was initiated by a warrant of arrest issued January 5, 1953, and served a few days thereafter. Deportation was sought pursuant to the provisions of § 241(a)(4) of the Immigration and Nationality Act, reading as follows (66 Stat. 204):

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either [fol. 140] sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; . . ."

The proceeding was based upon two distinct convictions for crimes involving moral turpitude, *viz.*, (1) the aforementioned conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory, and (2) a conviction of petty larceny, contrary to Mass. G.L., c. 266, § 30, upon a finding of guilty on January 4, 1949, after trial in the Third District Court of Eastern Middlesex, for which offense the court originally sentenced Pino to a term of one year in the House of Correction. The execution of this sentence was subsequently suspended by the court, and ultimately the sentence was revoked and the case placed on file, without, however, revoking the finding of guilty. Since the sentence of imprisonment was revoked and Pino served no time for this offense, it could not be used as a basis for deportation in the earlier proceeding under the Immigration Act of 1917. See *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (C.A. 2d, 1931). But, as above appears, § 241(a)(4) of the 1952 Act provides for the deportation of aliens convicted, after entry, of two crimes involving moral turpitude "regardless of whether confined therefor".

There is no doubt that the requirements of § 241(a)(4) have been satisfied so far as concerns the offense of carnal abuse of a female child. This offense is defined in Mass. G.L., c. 265, § 23, under the caption "Rape of Child." There [fol. 141] was introduced in the present proceeding a certified copy of a record in the Superior Court for Suffolk County, Mass., from which the following appears: On January 9, 1928, the grand jury handed down an indictment charging that Pino on November 17, 1927, made an assault upon a certain female child under the age of sixteen years with the intent unlawfully and carnally to know and abuse her; and did then and there unlawfully and carnally know and abuse her. Pino pleaded not guilty. After trial, a petit jury returned a verdict of guilty on March 20, 1928. On March 29, 1928, the Superior Court imposed upon Pino a sentence of commitment to the Massachusetts Reformatory at Concord for the term of five years and one day. Though appellant makes some half-hearted contention to the contrary, it cannot now be questioned that this offense properly belongs in the category of crimes involving moral turpitude. *Bendel* v. *Nagle*, 17 F. 2d 719 (C.A. 9th, 1927); *Ng Sui Wing* v. *United States*, 42 F. 2d 755 (C.A. 7th, 1931). See also *Commonwealth* v. *Roosnell*, 143 Mass. 32 (1886);

Commonwealth v. *Murphy,* 165 Mass. 66 (1895); *Commonwealth* v. *Hackett,* 170 Mass. 194 (1898).

That brings us to one of the more seriously contested points in the case, whether the record in the Third District Court of Eastern Middlesex, duly authenticated by the testimony of the First Assistant Clerk of that court, compels the conclusion, as a matter of law, that within the meaning of § 241(a)(4) of the Immigration and Nationality Act Pino stands "convicted" in that court of a "crime involving moral turpitude". From this record we derive the following: On December 8, 1948, a complaint was filed in the Third District Court of Eastern Middlesex charging that Pino did steal twelve golf balls of value less than one hundred dollars, the property of R. W. Shattuck Co., Inc. Pino pleaded not guilty. On December 23, 1948, the District Court, sitting without a jury of course, found the [fol. 142] defendant guilty and forthwith imposed a sentence of imprisonment for one year in the House of Correction. On December 27, 1948, Pino took an appeal to the Superior Court, which appeal, if it had been persisted in, would have entitled Pino to a trial *de novo* before a jury in the Superior Court. However, on December 28, 1948, this appeal was withdrawn by leave of court. On the same day a motion for a new trial was filed in the District Court and allowed by that court, which thereupon revoked its previous finding of guilty and continued the case for retrial. On January 4, 1949, after a new trial, the District Court again found defendant guilty and again imposed a sentence of one year's imprisonment in the House of Correction. On January 10, 1949, Pino appealed from this second judgment of conviction. But on January 28, 1949, this second appeal was withdrawn by Pino by leave of court and on the same day the District Court either expressly or impliedly reimposed the original sentence of one year's imprisonment in the House of Correction, and suspended the execution of the same to January 30, 1950. Though the formal entries do not so state, we gather from the testimony of the Assistant Clerk that this was automatically equivalent to putting the defendant on probation for one year beginning January 28, 1949. There was a further entry made on that date, "appeal waived". Apparently the probation report after Pino had served out his probationary period was satisfactory to the court, for as of January 30, 1950, appears the entry "Sentence revoked. On file." The Assistant Clerk testified that this was the usual procedure in the court, in that "where a man is given a suspended sentence and put on probation, he serves out his probation and the case is then filed".

Thus it appears that twice, after the District Court found Pino guilty and imposed sentence upon him, Pino had the opportunity to have a trial *de novo* in the Superior Court, [fol. 143] but in each instance he withdrew his appeal by leave of court. If Pino could have appealed again to the Superior Court when the reimposed or reinstated sentence of imprisonment was suspended by the District Court on January 28, 1949, and the defendant put on probation, such appeal seems to have been expressly waived. At any rate, Pino's acquiescence in the suspended sentence and acceptance of probation precluded a subsequent appeal. *Mariano* v. *Judge of District Court,* 243 Mass. 90 (1922); *Renado* v. *Lummus,* 205 Mass. 155 (1910). It is clear, also, that at that point Pino stood "convicted" in the District Court under any suggested definition of the word; and under § 241(a)(4) of the Immigration and Nationality Act, it is of no consequence that he was not actually imprisoned for the offense.

But appellant asserts that this record of conviction was in effect obliterated by the entry on January 30, 1950: "Sentence revoked. On file." In *Marks* v. *Wentworth,* 199 Mass. 44, 45 (1908), the Supreme Judicial Court discussed this procedure of placing a case on file:

> "It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133. See also *Commonwealth* v. *Foster,* 122 Mass. 317, 323; *Commonwealth* v. *Maloney,* 145 Mass. 205. The case then stands on the records of the court, and although usually no further

> proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it. But the case cannot [fol. 144] properly be placed on file without the consent of the defendant. He has a right to have it finally disposed of, without unreasonable delay, so that he will not be liable for an indefinite period to be brought into the court and subjected to punishment. Although this practice formerly prevailed only in the higher courts, it was extended by statute to the police, district and municipal courts. R.L. c. 160, § 39. St. 1893, c. 396, § 54. But when the statute gave to these courts authority to place complaints on file, it did not authorize such a disposition of a case against the objection of the defendant."

What was the District Court to do on January 30, 1950? The period had expired within which the execution of the sentence of imprisonment was suspended by prior order. Unless something was done about it, the sentence, no longer suspended, was subject to be carried into execution. If at that date the District Court was finally satisfied that the object of the one-year's probation had been accomplished, in such a way as not to require imprisonment of the defendant either for his own reformation or in the interests of the public, the logical thing to have done would have been to revoke the prison sentence and to dismiss the case, which final disposition the District Court had power to make. See *Marks* v. *Wentworth*, supra. But such action would not have been equivalent to wiping out the record of conviction in the District Court. The finding of guilty was unrevoked, and the order of dismissal in the circumstances would have been no more than a judicial determination that the ends of justice had been served by the period of probationary discipline and surveillance—"an authorized mode of mild and ambulatory punishment"—which had been imposed for the offense of which the defendant had been found guilty. See *Korematsu* v. *United States*, 319 U.S. 432, 435 (1943).
[fol. 145] But when the District Court on January 30, 1950, revoked the sentence, the court chose to place the case on file instead of finally disposing of it by dismissing it. As indicated in *Marks* v. *Wentworth*, supra, the District Court

could properly have put the case on file only with the consent of the defendant. Apparently the defendant acquiesced in this action of the District Court. At least, there is nothing in the record to suggest dissent. After his apparent acquiescence for over four years, we do not believe that Pino could successfully invoke in the Superior Court the extraordinary remedy of a writ of mandamus to compel the District Court to impose sentence or otherwise make a final disposition of the case. Such a remedy was obtained in *Marks* v. *Wentworth,* supra, but by a defendant who had strenuously registered his dissent at the very time the court, after a finding of guilty, placed the case on file.

The case thus being in the on-file status, technically the district court postponed indefinitely a determination whether the ends of justice required the imposition of a prison sentence for the offense of which Pino had been found guilty. Theoretically, the case could later be taken from the files and a prison sentence imposed. In the most unlikely event that this should happen, Pino asserts that he would be entitled to appeal from the sentence so imposed, and thus obtain a trial *de novo* before a jury in the Superior Court, which trial might result in an ultimate acquittal of the offense of petty larceny. Therefore Pino contends that the present posture of the case, in its on-file status, is so lacking in finality that on the record in the District Court it cannot be said that Pino stands "convicted" in the Massachusetts courts of the crime of petty larceny. Whether Pino could appeal from such a sentence newly imposed after the case was taken from the files we do not know for sure. For present purposes, we shall assume that he could, for we think it makes no difference anyway.

[fol. 146] In these deportation cases, where a state crime is involved, it is commonly said that the federal courts are governed by the laws of the state in determining whether the alien was "convicted" of such crime. *United States* v. *Smith,* 41 F. 2d 707, 708 (C.A. 7th, 1930). In a certain limited sense, this statement is accurate. We have to look to the law and procedure of the state to interpret what happened in the state courts. For instance, if a finding of guilty has been made by a court without a jury, the law of the state determines whether the court is authorized to make such finding of fact. But examination of the Massachusetts decisions on the meaning of the word "convicted" shows that the word may be given a certain meaning in one context, and something quite different in another. Thus in the leading case of *Commonwealth* v. *Lockwood,* 109 Mass. 323 (1872), the governor and council had issued a pardon to a person after he had been found guilty by verdict of the jury and before sentence had been imposed and while exceptions allowed by the trial judge were pending in the Supreme Judicial Court. It was held that the pardon was effective notwithstanding a provision in the constitution of the state that "no charter of pardon, granted by the governor, with advice of the council, *before conviction,* shall avail the party pleading the same". (Italics added.) The court pointed out that the ordinary legal meaning of "conviction" when used to designate a particular stage of a criminal prosecution triable by a jury "is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." (P. 325) In *Munkley* v. *Hoyt,* 179 Mass. 108 (1901), the court was dealing with a statutory provision authorizing the Board of Registration in Phar- [fol. 147] macy after hearing to suspend or revoke the registration of a registered pharmacist, "but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after *conviction* by a court of competent jurisdiction." (Italics added.) In this case a registered pharmacist had pleaded guilty to a complaint in the Superior Court charging him with unlawful sale of intoxicating liquor and thereupon that court had ordered the complaint placed on file. It was held that this was a "conviction" within the meaning of the foregoing statutory provision. On the other hand, in *Commonwealth* v. *Gorham,* 99 Mass. 420 (1868), applying a statute providing that criminal "conviction" of a witness might be shown to affect his credibility, the Supreme Judicial Court held that in this context the legislature meant to require not merely a verdict of guilty but a final judgment of the court determining guilt. See also *Forcier* v. *Hopkins*, 329 Mass. 668 (1953). And in *Commonwealth* v. *Kiley*, 150 Mass. 325 (1889), it was held that a statute providing that "the conviction by a court of competent jurisdiction" of a liquor licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of said person void", implied a final judgment of the court.

It is obvious that the Massachusetts courts have never been called upon to interpret the meaning of the word "convicted" in the context of a deportation case, where the word is used in an Act of Congress setting forth the requirements for deportability of aliens. In this context, in the interest of a uniform application of the federal statute, the meaning of the word "convicted" is a federal question to be determined upon due consideration of the policy which §241(a)(4) of the Immigration and Nationality Act was designed to serve.

[fol. 148] The object, of course, is to get rid of aliens with socially undesirable criminal traits. Once in a while, an innocent man may be convicted. But Congress did not impose upon the Attorney General the impossible administrative burden of ascertaining *de novo* whether the alien in fact was guilty of the offenses of which he had been legally convicted. If there stand against the alien two or more records of conviction in courts of competent jurisdiction of crimes involving moral turpitude, the assumption of the Act is that the alien was guilty of the offenses in question and that his social undesirability has thus been sufficiently established for purposes of deportation.

But since legal determination of guilt is made the statutory test of deportability, we should seek an interpretation of the word "convicted" in §241(a)(4) as will ensure that this legal determination has been made with reasonable certainty and finality. Perhaps a formal plea of guilty to a complaint or indictment, accepted by the court, is a conviction in this sense, even before the court takes any action on the matter of sentence. See *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); *United States* v. *Scarlata*, F. 2d (C.A. 3d, July 19, 1954). We do not have that problem here, for Pino pleaded not guilty to the charge of petty larceny. The government contends that upon a plea of not guilty, the statutory requirement of being "convicted" is satisfied, without more, when a verdict of guilty is returned by the jury, or a finding of guilty is made by the court, as the case may be. We are not prepared to assent to this proposition. A verdict or finding of guilty is usually followed by a motion for a new trial which, as we know, and as was so in Pino's petty larceny case, frequently results in the award of a new trial. So, too, appeals from conviction in the trial court often result in the award of a new trial. Judicial action on the motion for a new trial made immediately after a verdict or finding of guilt, and judicial action [fol. 149] in the normal routine appellate review provided by law, are part of the ordinary processes of re-examination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definiteness, that the state has "convicted" the alien of crime.

However, if the government must stay its action of deportation to await the outcome of these routine processes of judicial re-examination, that does not mean that the government has to wait forever, until every remote possibility of ultimate upset of a conviction has been extinguished. It is a possibility that, long after conviction in the ordinary sense, new evidence may be discovered, and the case reopened on that ground and a new trial granted. In Massachusetts, many years after verdict of guilty, imposition of sentence, and even affirmance on appeal, it may be possible to obtain the setting aside of a conviction on the ground that it was procured in derogation of the accused's fundamental constitutional rights, by the procedure of a writ of error issued out of the Supreme Judicial Court. See *Lindsey* v. *Commonwealth*, Mass. , 116 N.E. 2d 691 (1954); *McGarty* v. *Commonwealth*, 326 Mass. 413 (1950); *Allen* v. *Commonwealth*, 324 Mass. 558 (1949). In other states, a long-standing conviction may, in subsequent habeas corpus proceedings, be judicially determined to have been illegal. The mere possibility of such ultimate upsets does not defeat deportation of the convicted alien; though of course if, prior to deportation, he has succeeded in one of these ways in upsetting his conviction it can no longer serve as a basis for deportation.

With these general considerations in mind, we are satisfield that on the record in the Third Judicial Court of Eastern Middlesex, as above recited, Pino stands "convicted" of the crime of petty larceny within the meaning of § 401(a)(4). Pino was tried, found guilty, and sentenced to imprisonment. Upon a routine motion for a new trial, [fol. 150] the District Court vacated its finding of guilt, tried him a second time, again found him guilty and reimposed the sentence of imprisonment. Twice Pino appealed to the Superior Court, but in each instance he withdrew his appeal and voluntarily relinquished the opportunity to test his innocence in the appellate courts of the Commonwealth. Execution of the sentence was suspended for a year, during which time we gather that Pino was on probation. At the end of the year the sentence was revoked and the case placed on file in the District Court. Placing the case on file was not equivalent to a revocation of the judicial determination of Pino's guilt, which for deportation purposes is the principal measure of his lack of social desirability. The action of placing the case on file only meant that for the time being the District Court was satisfied that the interests of justice did not require the imposition of a prison term upon Pino for the offense of which he stood convicted; but, as above pointed out, it is of no consequence under the wording of § 241(a)(4) that Pino did not actually serve time for the offense. Though theoretically it may be possible for the District Court at some time in the future to take the case from the files and make a final disposition of it, if we take account of the ordinary modes of procedure in the local courts it must be concluded that there is every probability that, once a case is placed on file, it will remain in that status undisturbed and probably forgotten. This petty larceny case against Pino has already remained on file four and a half years. Pino cannot as a matter of right have it removed from that on-file status so as to have the outstanding record of conviction obliterated.

In fact, after the present deportation proceeding was commenced, Pino filed in the District Court on February 4, 1953, a motion for a new trial on the ground of newly discovered evidence. This motion was denied by the District Court on December 23, 1953, whether on the merits [fol. 151] or on the ground that the motion was untimely does not appear. Of course, if the District Court, pending the deportation proceedings, had granted this long-delayed motion for a new trial and had vacated the finding of guilt, then the prior conviction of this particular crime could no longer have served as a basis for deportation. And while this motion for a new trial was pending undisposed-of by the District Court, with the possibility that it might eventuate in the ultimate establishment of Pino's innocence, Pino might have applied to the District Director for a stay of deportation to await the outcome, but the granting of such a stay would have been a matter of administrative discretion. See 8 C.F.R. (1952 Rev.) § 243.3(b).

Appellant has made no contention in this court that the crime of larceny is not properly to be classified in the general category of crimes involving moral turpitude. It is well-settled that, in ordinary acceptation, the crime of larceny, whether grand or petty, is a crime involving moral turpitude. *Blumen* v. *Haff*, 78 F. 2d 833 (C.A. 9th, 1935); *Tillinghast* v. *Edmead,* 31 F. 2d 81 (C.A. 1st, 1929). We shall say a word about that. There is some force in the comment by Judge Anderson, dissenting, in *Tillinghast* v. *Edmead*, supra (at p. 84): "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude." Indeed, it is possible to conceive of circumstances under which almost any crime might be committed from the purest of motives, motives, however, which the law does not accept as a defense. But here again, with considerations of administrative workability in mind, Congress has painted with a broad brush. If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude neither the administrative officials in a deportation proceeding nor the courts on review [fol. 152] of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extentuating factors which might relieve the offender of the stigma of moral obliquity. See *United States ex rel. Robinson* v. *Day,* 51 F. 2d 1022 (C.A. 2d 1931). Congress did not overlook the possibility of extenuating circumstances in the particular case, for it prescribed in § 241(b) of the Immigration and Nationality Act of 1952 that the provisions of § 241 (a) (4) respecting the deportation of an alien convicted of a crime or crimes "shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not to be deported . . ." (66 Stat. 208) A similar provision was found in § 19 of the Immigration Act of 1917. (39 Stat. 889-90)

While appellant relied primarily upon the argument that, on the record in the Third District Court of Eastern Middlesex, he does not stand "convicted" of the crime of larceny, he also urges that he is not deportable under § 241(a)(4) of the Immigration and Nationality Act because that section should be given a strictly prospective construction rendering it inapplicable to crimes and convictions which occurred prior to the day when the Act took effect in 1952. This contention, as observed in the government's brief, makes the unlikely assumption that Congress intended in 1952 to exempt those aliens from deportation who had already revealed the identical socially undesirable criminal traits which Congress now believes to be a sufficient basis to warrant the withdrawal of the privilege of continued residence [fol. 153] in this country, and that Congress was concerned merely with those aliens who at some time in the future might display those characteristics. It would also follow that if an alien prior to 1952 had been convicted of a most heinous crime of moral turpitude, and after the effective date of the 1952 Act had been convicted of one other crime involving moral turpitude, he could not be deported under § 241(a)(4) because the section requires, under the suggested interpretation, a minimum of two convictions after the effective date of the Act. We think the statutory language clearly negatives this reading. Section 241(a) provides that any alien in the United States shall be deported who "(4) . . . *at any time after entry* is convicted of two crimes involving moral turpitude . . ." (Italics added.) This is to be contrasted with the language of § 241(a)(3), "hereafter, within five years after entry, . . ." and of § 241 (a) (11), ". . . hereafter at any time after entry . . ." It is also significant that in the comparable provision of the predecessor Act, § 19 of the Act of 1917 (39 Stat. 889), Congress provided for the deportation of ". . . any alien who is *hereafter* sentenced to imprisonment for a term of one year or more . . . or who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry" (italics added); but Congress chose to omit the key word "hereafter" in § 241(a)(4) of the 1952 revised statute. Furthermore, § 241(d) lays to rest any possible doubt on the matter. That subsection reads: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all liens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) *that the facts, by reason of which any such* [fol. 154] *alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.*" (Italics added.)

Certain additional points of a procedural nature are advanced by appellant. He says he was deprived of procedural due process in that the Special Inquiry Officer introduced in evidence a long police record involving Pino, and also certain FBI reports covering Pino's continuous brushes with the criminal law. Admittedly these were hearsay documents irrelevant to the legal issues involved in the charges on which deportation was sought. Their introduction before a jury trying contested issues of fact would no doubt have been prejudicial, for a reading of the documents tends to leave one with the impression that over the years Pino has shown himself to be a particularly undesirable alien, if ever there was one. But if, as we have held as a matter of law, the authenticated and unchallenged records in the Massachusetts courts reveal that the alien, since his entry into the United States, has been convicted of two crimes involving moral turpitude, how can we conclude that the Special Inquiry Officer was in error in ordering

Pino's deportation on the ground that such deportation was required by § 241(a)(4) of the Act? If the case went back for another administrative hearing, the same result would be inevitable. Other alleged procedural errors are strictly in the nature of grasping at straws and we find no sufficient merit or plausibility in any of them to warrant special discussion.

The order of the District Court is affirmed.

[fol. 155] IN UNITED STATES COURT OF APPEALS

JUDGMENT—August 2, 1954

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court: (S.) Roger A. Stinchfield, Clerk.

[fol. 156] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 157] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 333

ANTHONY PINO, Petitioner,

vs.

HENRY NICOLLS, District Director of Immigration and Naturalization

ORDER ALLOWING CERTIORARI—Filed November 8, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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